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No. _____

In The
Supreme Court of the United States

JOHN PUDELSKI,
Petitioner,

v.

JULIUS WILSON, WARDEN,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Where a federal court reviews an actual innocence claim raised in a 28 U.S.C. 2254 habeas claim, may that court defer to state court findings in determining whether it is more likely than not that no reasonable jury would have found the petitioner guilty of the charged offenses beyond a reasonable doubt?

II. Where a petitioner requests and is denied discovery of favorable evidence in the state court, must a federal district court require production of the disputed evidence before determining whether a Brady violation had occurred pursuant to 28 U.S.C. § 2254(d)(1) or 28 U.S.C. § 2254(d)(2) where is it clear that the disputed evidence is dispositive of the issue?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, John J. Pudelski, respectfully prays that a writ of certiorari issue to review the judgment below of the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Ohio Eighth District Court of Appeals appears at Appendix E to the Petition and is unpublished *State v. Pudelski* (February 23, 2006), Cuyahoga App. No. 85989, unreported.

The opinion of the Sixth Circuit Court of Appeals appears at Appendix A to the Petition and is published at *Pudelski v. Wilson,* 576 F.3d 595, 612 (6th Cir. 2009)

JURISDICTION

Petitioner is appealing the denial of his appeal by the federal Sixth Circuit Court of Appeals, *Pudelski v. Wilson,* 576 F.3d 595, 612 (6th Cir. 2009) decided August 14, 2009 and the denial of the rehearing, *en banc Pudelski v. Wilson*, 2009 U.S. App. LEXIS 23706 (6th Cir., Oct. 26, 2009)

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentation or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim– (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(d), (e)(1) (2006).

STATEMENT OF THE CASE

I. Mr. Pudelski's Trial

This case arises from the September, 1999 conviction and sentence of the Petitioner John Pudelski, in the Cuyahoga County, Ohio, Common Pleas Court, for the murder of his infant daughter Ellie Marie Pudelski. The prosecution argued she died from a blow to her head with a blunt object. The defense presented experts that testified that she had died from birth complications.

On March 16, 1999, the petitioner's wife, Sarah Pudelski, was admitted to a hospital due to complications relative to her 37 weeks pregnancy. Her attending obstetrician diagnosed pregnancy-induced hypertension and noted Sarah's worsening condition. (Transcript p. at 214, 216-217). The doctor ordered labor-inducing medication but Sarah's labor did not progress as expected. (Transcript p. at 217-219). After 34 hours, the doctor determined that delivery by cesarean section was necessary. (Transcript p. at 227).

Because of the complicating factors, Dr. William Zaia, a neonatologist, was also present in the delivery room. (Transcript p. at 228, 345). Following delivery, Dr. Zaia noticed that the baby was not breathing for the first minute of her life. Elly needed to be "kick started" through the use of an oxygen bag and a mask, and vigorous stimulation. (Transcript p. at 332-33, 335).

Elly remained at the hospital until March 20, 1999. She was examined and observed by a variety of medical personal whose reported findings were not totally consistent. On March 23, 1999, Lois Fulton, R.N., a home health care aide, visited John and Sarah's home. (Transcript p. at 180, 182; Vol 3). Ms. Fulton interviewed Sarah and completed a form for Sarah to sign. (Transcript p. at 193; Vol 3). Ms. Fulton observed Elly's physical appearance, including Elly's head, and she appeared normal and satisfactory. (Transcript p. at 184, 186; Vol 3).

At approximately 7:00 a.m., on March 29, 1999, Sarah alerted John that Elly appeared unresponsive and cold. (Transcript p. at 807; Vol 5). John called 9-1-1 and attempted resuscitation. (Transcript p. at 168-172; Vol 3). EMS transported Elly to the hospital where she was pronounced dead by Dr. Kerry Scott. (Transcript p. at 742-743).

Although Dr. Scott claimed not to have examined the right side of Elly's head or scalp, he acknowledged that had there been a gross abnormality, a large swelling or an obvious mass, he would have noticed it. (Transcript p. at 753, 766; Vol 5). Dr. Scott found no abnormality of any kind relative to Elly's head or scalp. (Transcript p. at 753; Vol 5). Dr. Scott

completed a form relating to Elly's death indicating no noticeable injuries, concluding sudden infant death syndrome ("SIDS") as the probable cause of death. (Transcript p. at 758; Vol 5).

Dr. Joseph Felo, a Cuyahoga County, Ohio, deputy coroner for approximately nine months, (Transcript p. at 519; Vol 4) performed the autopsy on March 30, 1999. Dr. Felo did not review nor did he have knowledge of Sarah's complicated and prolonged labor, accepting as true the (incorrect) statements from the Euclid Police relating a normal birth. (Transcript p. at 510; Vol 4). Dr. Felo did not review any medical records prior to performing his autopsy. (Transcript p. at 508-509; Vol 4).

X-rays revealed a linear, four-inch skull fracture with no gross intracranial injuries, (Transcript p. at 546; Vol 4), on the side of Elly's head without signs of healing. Dr. Felo claimed that the sutures, the spaces between the skull bones, were separated as if something inside the skull was forcing the bones to separate. (Transcript p. at 386-387; Vol 4).

Dr. Felo observed a soft mass on the right side of the skull approximately 3½ by 2 inches, and ¾ inch thick. He opined that Elly's head was malformed. (Transcript p. at 388-389; Vol 4). Dr. Felo noticed fresh blood underneath the scalp, (Transcript p. at 393; Vol 4), Dr. Felo claimed that microscopic examination of tissue supported his conclusion that the skull fracture was fresh, less than 24 hours old. (Transcript p. at 396, 400; Vol 4).

Dr. Felo estimated that death occurred three to four hours following the "injury," (Transcript p. at 413;

Vol 4). He found twelve milliliters, approximately ¼ ounce, of liquid in Elly's stomach from which he estimated trauma as having occurred after the midnight feeding. (Transcript p. at 419, 431; Vol 4). Thus, he concluded that Elly died close to 3:00 am. (Transcript p. at 428, 431; Vol 4).

Dr. Felo ruled out SIDS as the cause of death and concluded that Elly died as a result of cerebral edema due to a single blunt impact to the head with a skull fracture and the scalp hemorrhage. (Transcript p. at 410, 491, 506; Vol 4). Both Dr. Felo and Dr. Balraj were unaware of any mechanism or instrumentality of the blunt force. There was no evidence of bruising or scratching to Elly's head. (Transcript p. at 515, 545, 1020; Vol 4 & 5, 1205).

Petitioner Pudelski's defense consisted of evidence from three prominent medical experts and character testimony. Dr. Robert Kiwi, chief of obstetrics and gynecology at University Hospitals of Cleveland, (Transcript p. at 1152; Vol 6), specializes in the treatment of women who experience difficulties and complications in their pregnancies. (Transcript p. at 1156; Vol 6). Dr. Kiwi noted that Sarah was in the latent phase of labor for over twenty hours, from the time Pitocin was instituted. Sarah Pudelski's labor was not a normal, active progress of labor. (Transcript p. at 1175; Vol 6). When the decision for a C-Section is made due to the baby's failure to progress, the fetus's head will wedge into the pelvis, making it easier to deliver the baby's head. (Transcript p. at 1175; Vol 6). As the medical records indicated that there was little difficulty with the head, Dr. Kiwi found that Elly's head was either not completely wedged in or had been

dislodged, but that it had not descended into the pelvis. (Transcript p. at 1175-1176; Vol 6).

The presence of a four-inch non-depressed linear fracture was not surprising to Dr. Kiwi as these fractures occur very frequently with the infant suffering no ill effects. (Transcript p. at 1180-1181; Vol 6). Dr. Kiwi distinguished between a depressed fracture, where one can feel a depression in the baby's skull, and a linear fracture, which is across the bone and is not displaced (the tow edges are in exactly the same line as they ought to be). A linear fracture generally cannot be diagnosed clinically. (Transcript p. at 1183; Vol 6). Dr. Kiwi concluded,

> that [Elly's skull] fracture was, *** more likely than not, to have occurred at the time of birth, rather an acute injury [at or near the time of death], because I didn't see any evidence that this was an acute injury.

(Transcript p. at 1188 and 1190; Vol 6). Dr. Kiwi testified that the linear fracture did not impact upon Elly's brain. (Transcript p. at 1189, 1192; Vol 6).

Dr. Jan Leestma, board certified in anatomic pathology and neuropathology, testified that Elly did not die as a result of blunt force trauma leading to cerebral edema. He believed that the trauma of the birthing process caused the skull fracture. (Transcript p. at 1379; Vol 6).

Dr. Michael Baden, board certified in anatomic pathology, clinical pathology, and forensic pathology, found that Elly's brain was normal at autopsy (and during life), and that she did not die of any brain

abnormality, nor was her death a homicide. (Transcript p. at 1580-1583; Vol 7).

> My opinion is that the cause and manner of death of the child is undetermined, which fits into a large number of children and babies who die, in which the exact cause of death can't be pin-pointed. Sometimes these causes are called sudden infant death syndrome, but we really don't know what the cause of death is. In this instance, there's an abnormality, a definite abnormality, the skull fracture, but nobody dies of a skull fracture. Skull fracture just indicated force. It indicates a break in the protective covering of the brain, but the death is caused if there's underlying brain damage. And in this instance, in my opinion, **there is not underlying brain damage, and therefore, there's no other reason identified as the cause of death. So I would have to make a determination the cause of death was undetermined, with the information presently available.**

(Transcript p. at 1578; Vol 7, emphasis added)

The jury acquitted Pudelski of aggravated murder, but found him guilty of murder.

New Trial Motions

Pudelski filed a Motion for Post-Verdict Judgment of Acquittal or in the alternative for New Trial which the Court denied. The court sentenced John to a term of imprisonment of fifteen years to life.

Pudelski filed a second Motion for New Trial based upon Newly Discovered Evidence – photographs taken the day after Elly's birth. These revealing pictures exhibited a large bruise on Elly's head, a bruise overlooked by all of the state's witnesses who testified that such a bruise did not exist. The picture exhibited the large bruise at the very location of Elly's head where Dr. Felo discovered the linear fracture and where Dr. Leestma testified he expected to have seen a bruise such as he described during his testimony.

The trial court conducted a hearing wherein additional medical experts testified and a computer generated digital recreation confirmed the fracture's location underneath the bruised area as reflected in the newly discovered picture, further supporting the defense evidence that the fracture was caused at birth. The trial court overruled the motion for New Trial.

II. State Court Appeals

The Ohio Eighth District Court of Appeals affirmed this conviction and sentence in *State v. Pudelski* (March 15, 2001), Cuyahoga App. No. 77172, unreported. The Ohio Supreme Court, in *State v. Pudelski* (2001) 92 Ohio St.3d 1445, then dismissed his appeal *sua sponte* and in *State v. Pudelski* (2001) 93 Ohio St.3d 1453, denied his Motion for Reconsideration.

On April 21, 2003, Pudelski filed a Petition to Vacate or Set Aside Judgment and/or Sentence with the Cuyahoga County Common Pleas Court. The Common Pleas Court, on February 16, 2005, dismissed this Petition without a hearing. Pudelski then timely appealed to the Eighth District Court of Appeals. In

State v. Pudelski (February 23, 2006), Cuyahoga App. No. 85989, unreported, the Court of Appeals affirmed the decision dismissing the Petition. Pudelski then filed a Memorandum in Support of Jurisdiction with the Ohio Supreme Court, which, on August 2, 2006, declined to grant jurisdiction.

III. Habeas Procedures

Pudelski, on July 25, 2002, petitioned the United States District Court, Northern District of Ohio, Eastern Division, for a Writ of Habeas Corpus, which Petition stated five grounds for relief. On March 20, 2003, the District Court stayed habeas proceedings to allow Petitioner to exhaust available state remedies related to his fifth ground for relief.

On August 28, 2006, Pudelski filed a Traverse with the United States District Court notifying the District Court that he had exhausted all available state remedies with respect to his fifth ground for relief. On April 24, 2007, the Magistrate Judge issued a Report and Recommendation concluding that the District Court should deny Pudelski's Petition for Writ of Habeas Corpus. On May 8, 2007, Pudelski filed objections to the Report and Recommendation. On May 30, 2007, the District Court adopted the Report and Recommendation, denied Pudelski's objections, denied his Petition for Writ of Habeas Corpus and declined to issue a Certificate of Appealability.

Pudelski applied for a Certificate of Appealability to the Sixth Circuit Court of Appeals. The Sixth Circuit granted the request on two issues. On August 14, 2009, the Court affirmed the denial of the petition, with a dissent on the Brady issue. *Pudelski v. Wilson,*

576 F.3d 595, 612 (6th Cir. 2009) Dissenting Judge Clay would remand the matter to the district court to require the state to produce the disputed document, a police report, so that the district court could properly evaluate the materiality of that report. Thereafter, petitioner moved the Sixth Circuit Court of Appeals for a rehearing, *en banc,* petitioner's motion was denied, *Pudelski v. Wilson*, 2009 U.S. App. LEXIS 23706 (6th Cir., Oct. 26, 2009).

REASONS FOR GRANTING THE WRIT

I. A federal court reviewing an actual innocence claim raised in a 28 U.S.C. 2254 habeas claim may not defer to state court findings in determining whether it is more likely than not that no reasonable jury would have found the petitioner guilty of the charged offenses beyond a reasonable doubt.

Pudelski argues here and below that he is actually innocent of the charges on which he has been convicted. In reviewing his appeal, the Sixth Circuit Court of Appeals invoked an incorrect standard of review when determining whether Pudelski was "actually innocent" of the defense. The circuit used a mixed standard of state court deference and sufficiency of the evidence. Whatever standard was used, it did not meet this Court's direction set forth in *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851(1995) and *House v. Bell*, 547 U.S. 518, 126 S. Ct. 2064 (2006).

In denying Pudelski's claim of actual innocence, the Sixth Circuit Court of Appeals held that:

> Even if the jury had been presented with the photograph, Pudelski has not shown that the result of the trial would have been different. The trial court did not abuse its discretion or misapply Ohio law when denying Pudelski's motion for new trial, and the denial of the motion did not infringe on Pudelski's due process rights or his right to a fundamentally fair trial. The court of appeals' affirmance of the trial court's decision was reasonable and likewise did not deny Pudelski a fundamentally fair trial or violate his right to due process of law. Pudelski is not entitled to habeas relief on his first ground for relief.

Pudelski v. Wilson, 576 F.3d 595, 612 (6th Cir. 2009)

Thus, the court's review standard included deference to the state court finding based on the presentation of new evidence, the application of the state findings to state law, and a "would have been different" verdict standard. None of these standards comparts with the proper review standard. The circuit impermissibly relied upon its own findings rather than determine what an individual reasonable juror would have found.

Proper Actual Innocence Standard of Review

In *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851 (1995) this Court held that prisoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." 513 U.S. at 327, 115 S. Ct. 851.

When considering an actual-innocence claim in the context of a request for an evidentiary hearing, the District Court need not "test the new evidence by a standard appropriate for deciding a motion for summary judgment," but rather may "consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." 513 U.S., at 331-332, 115 S. Ct. 851.

Schlup manadates that the habeas court must consider "'all the evidence,'" old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial." See *Id.* at 327-328, 115 S. Ct. 851, 130 L. Ed. 2d 808. Based on this total record, the court must make "a probabilistic determination about what reasonable, properly instructed jurors would do." 513 U.S. at 329, 115 S. Ct. 851. Most important to Pudelski's case, the court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors. *Ibid.* The Sixth Circuit here made no attempt to address what a reasonable, properly instructed juror would do had that juror been able to consider the new evidence.

Second, it is acknowledged that the *Schlup* standard is demanding and permits review only in the "'extraordinary'" case. *Id.*, at 327, 115 S. Ct. 851 (quoting *McClesky v. Zant*, 499 U.S. 467, at 494, 111 S. Ct. 1454 (1991)). At the same time, the *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence. A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable

juror would find him guilty beyond a reasonable doubt--or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.

Finally, as the *Schlup* decision explains, the gateway actual-innocence standard is "by no means equivalent to the standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979)," which governs claims of insufficient evidence. *Id.*, at 330, 99 S. Ct. 2781. When confronted with a challenge based on trial evidence, courts presume the jury resolved evidentiary disputes reasonably so long as sufficient evidence supports the verdict. Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. See *Ibid.* If new evidence so requires, this may include consideration of "the credibility of the witnesses presented at trial." *Ibid.*; see also *ibid.* (noting that "[i]n such a case, the habeas court may have to make some credibility assessments").

Review of New Evidence in Present Case

Subsequent to his trial and the jury verdict, Petitioner Pudelski's trial counsel came into possession of significant new direct evidence, to wit: a photograph of the infant taken the day after she was born. On the back of the baby's head was clearly picture a very large red bruise that no one who testified during the trial, neither the child's mother, nor her attending physicians, ever noticed or acknowledged as existing prior to death. This newly discovered photograph conclusively proved that Petitioner's infant daughter

had been born with a substantial head/skull injury in the exact location which the coroner concluded had caused her death. The trial court found that the new evidence was merely cumulative based upon the fact that Petitioner's expert witness had theorized, and testified at trial, that her injury had likely been caused during her difficult birth.

The newly discovered evidence was supported by testimony at the evidentiary hearing. A video was presented showing that the birth injury illustrated in the newly discovered photograph exactly overlaid the location of the skull fracture present at the infant's death. The new photograph was direct and new evidence sufficient to warrant a new trial because it directly supported the opinions of Petitioner Pudelski's experts that were presented at trial. The trial court ignored that physical proof of the injury is far more persuasive to a juror than the theory of a defense expert.

The prosecution's case relied heavily on the failure of the defense to present direct evidence in support of their argument that the baby's head injury resulted form an accident during the birth process. The newly discovered photograph is demonstrative evidence of the fact that the infant had been born with a serious and severe head injury, which Pudelski argues ultimately caused her unfortunate death.

In closing argument, the prosecution reiterated Pudelski's lack of direct evidence during the final argument, where the state reminded the jury that:

> Each of these persons (medical providers and Sarah Pudelski) testified that they did not see

> or did not note this injury to the baby's head, right side of the baby's head. The defense tells you that these people simply missed this. They did not miss this injury. It simply was not present.

(Transcript p. at 1906; Vol 6).

> So you know, they – mean, you can get up on the witness stand, and you can say, you know, my jacket is pink, my jacket is pink, my jacket is pink. If it's not, it's not. I don't care what kind of degrees you have. So they can get up there and say, this is a difficult delivery all they want. Prove it with the records. Prove it with the testimony. Just prove it. They didn't prove it.

(Transcript p. At 1952; Vol 6; Apx p. 1335).

The newly discovered photograph, which was not discovered until a lost roll of film had been found and developed by Pudelski's family after the conclusion of his trial, confirmed that his highly skilled and accomplished medical experts had correctly pinpointed the time and cause of the injury and had correctly analyzed the circumstances and cause of the infant's injury and death.

In addition to the photograph, Pudelski presented the trial court a computer generated digital recreation in conjunction with expert testimony from David Berns, M.D., board-certified in neuroradiology. (Transcript p. at 2347; Vol 7). At the state court evidentiary hearing on Pudelski's motion, expert pathologist, Dr. Berns, testified that the bruise

pictured on the infant's head "closely approximate[s], if not directly overlie[s], the area of the skull fracture demonstrated on the coroner's radiographs." (Transcript p. at 2350; Vol 7). This photograph and the evidence derived there from emphasized the importance of the newly discovered photograph in directly (not circumstantially) proving that the infant's fracture as having resulted from the prolonged and complicated labor as testified by Pudelski's medical experts, Drs. Kiwi, Leestma and Baden.

The support the new photograph would add to Petitioner's experts' testimony discloses a strong probability that it would change the result if a new trial is granted. Indeed, considering the weaknesses of the prosecution's case, no reasonable juror could conclude beyond a reasonable doubt that the birth injury did not cause the infant's death.

Summary

In sum, considering "'all the evidence,'" *Schlup*, 513 U.S., at 328, 115 S. Ct. 851, 130 L. Ed. 2d 808, on this issue, the petitioner claim of actual innocence should be sustained where the following evidence proved; that Sarah Pudelski had a long and difficult labor that culminated with a cesarian delivery, and that photographic proof shows a prior head injury existed at the time the baby left the hospital and arrived home just 8 days prior to the baby's death; that the police testified that they completed their investigation they had no evidence that the baby's death was the result of criminal activity; that Dr. Felo of the Cuyahoga Coroner's Office could not conclude that the injury he examined was the result of either intentional, accidental or other. Furthermore, that the newly

discovered evidence, the picture, directly supports the trial testimony of the petitioners experts Drs., Kiwi, Leestema and Baden that was offered before the confirming photograph was discovered.

II. Where a petitioner requests and is denied discovery of favorable evidence in the state court, must a federal district court require production of the disputed evidence before determining whether a Brady violation had occurred pursuant to 28 U.S.C. § 2254(d)(1) or 28 U.S.C. § 2254(d)(2) where is it clear that the disputed evidence is dispositive of the issue?

In the instant case, the Cuyahoga County coroner Dr. Elizabeth Balraj offered expert testimony that the death of Pudelski's infant daughter constituted a homicide rather than an accident at home or injury which occurred at birth. That expert opinion formed the crux of the prosecution's case. The police withheld a report relied upon by the coroner in forming her opinion which was inaccurate at best. Therefore, the denial of this material impeaching information resulted in a substantial and injurious effect upon the jury verdict which rendered that verdict unreliable.

Dr. Balraj, in arriving at her opinion that the infant's death was a homicide, relied upon certain undisclosed information furnished by the police. (Transcript p. at 985, 996-997; Vol 5). Dr. Balraj specifically stated that the information regarding the alleged assault upon the infant came from the police reports received by her office. (Transcript p. at 1022; Vol 5). Due to the fact that Dr. Balraj was an expert

witness, Petitioner and his counsel were entitled to the disclosure of all information upon which she relied to formulate her opinion. Despite this expert's reliance upon such information, the trial court denied the defense request to review the materials used to form the basis of Dr. Balraj's opinion testimony. (Transcript p. at 986; Vol 5).

In the case *sub judice*, Balraj's testimony was so unfairly prejudicial that it rendered Pudelski's trial fundamentally unfair. Further, the denial of access to the records used by the state's witness to render her opinion denied the Petitioner a full and fair cross-examination. Restated, the error of denying access to the police reports relied upon to form the doctors opinion denied Pudelski his right to a fair trial and, thus, violated Due Process. Due Process requires the exclusion of evidence that is so unduly prejudicial that it renders the trial fundamentally unfair. *Greer v. Miller*, 483 U.S. 756 (1987).

A. Denial of Access to Police Reports violated due process by the exclusion of impeaching/exculpatory evidence and denied the Petitioner a fair trial.

The defense was denied access to the police reports used by the coroner to determine the case to be a homicide rather than and accident at birth. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963) the Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady* 373 U.S. at 87; see also *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). In

United States v. Agurs 427 U.S. 97 (1976), it became clear that a defendant's failure to request specific favorable evidence did not leave the government free of all obligations.

In *United States v. Bagley,* 473 U.S. 667 (1985), this Court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes, and it abandoned the distinction between the second and third *Agurs* circumstances, i.e., the "specific-request" and "general or no-request" situations. *Kyles,* 514 U.S. at 433. *Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, "if there is a reasonable probability that, had evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.*

The Sixth Circuit majority found that Pudelski had failed to produce the actual report at the district court and therefore had failed to proof the prejudice. The dissent disagreed, noting that it is the state the holds the burden to produce favorable evidence. As this Court has stated that a rule that "'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process[,]" *Banks v. Dretke*, 540 U.S. 668, 124 S. Ct. 1256, (2004), it is equally untenable to fault Pudelski for failing to produce a report that he himself requested but was denied.

B. Disputed Police Report

Critical to Petitioner's case was evidence which converted the infant's death from being of unknown causes to that of being a homicide. There was

disparity in the testimony of the State's witnesses relative to what exact information led authorities to believe that a crime had been committed – and that a crime had been committed by Petitioner.

Assistant County Coroner Dr. Joseph Felo testified that he had no information from which he could conclude the blunt force trauma was intentional, accidental, or other. Similarly, the police, after having concluded their investigation and arresting Petitioner for murder, had no information from which to conclude that the infant's death resulted from criminal activity.

Importantly, Coroner Dr. Balraj testified, contrarily, however, that she reviewed and relied upon the police information in arriving at her opinions relative to the death of Petitioner's infant daughter.

In light of these instances of disparate testimony, the trial court committed prejudicial, reversible error by refusing to permit defense counsel access to the underlying police reports. Even though the police reports appear to have more impeachment quality rather than direct exculpatory importance their constitutional relevance cannot be diminished in light of *Bagley*, *Brady* and *Kyles*. In the instant case because the police reports were not released to the petitioner during his trial the opportunity to impeach the coroner on her conclusion and factual foundation was irretrievably lost.

In the case sub judice the availability, at trial, of the police reports would have been favorable for the Petitioner. The availability of the police reports that if the testimony of Det. Jorz and Dr. Felo is to be believed would have afforded the defense to impeach

Dr. Balaj, on her expert testimony, by indicating that she was not familiar with or perhaps inflating the value of the police investigation in this case. Therefore, as *Bagley* has set forth the police reports as impeaching evidence in this case would have indeed been favorable to the Petitioner. Furthermore, not only was this information not supplied by the government it was also withheld by the court even after the Petitioner had shown that he was entitled to the police reports by rule of evidence as set forth in the previous assignment of error. Finally, Pudelski suffered prejudice because of the denial of this evidence.

The Petitioner Pudelski has lost an opportunity in front of the jury to challenge the states most important witness on her understanding of the underlying facts in this case. While quantitatively there is no practical way to measure prejudice anytime the trial dynamic is influenced the level of prejudice is difficult to measure. However, Pudelski has lost the chance to challenge the state evidence was implicit in his right to a fair trial and assurance to protection of his right to Due Process. "The right of counsel for the accused to confront, cross-examine and impeach is cherished and remains the means by which "the scope and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (Burger, C.J.).

In the case at bar, all evidence favorable to Petitioner was requested by defense counsel prior to trial. Copies of police reports were never provided. The police reports are material and exculpatory because they must cast doubt on the credibility of the State's expert witness who supplied the only evidence of Petitioner's criminal conduct, in the form of expert

opinions, in this circumstantial evidence case. If the police report does not provide any information from which the Coroner could find the infant's wounds were the result of an assault by Petitioner, then her testimony is directly impeached. If the report does not contain such information, then the reliability of the report is challenged by the police officer's testimony and the expert's reliance on the report is directly challenged.

The dissent below understood the importance of the report to the credibility of the coroner's testimony. The dissent noted that the prosecution erred:

> . . . when it failed to disclose a police report that was provided to the state's expert witness. Taking into consideration the facts presented in this case, there is a reasonable likelihood that the report at issue could have been used to impeach a critical state witness who testified unequivocally as to the cause of the victim's death. However, because the contested report was never provided to Pudelski and is not part of the record in this case, no court has had an opportunity to properly assess its impeachment value in order to determine whether the prosecution withheld favorable and material evidence in violation of *Brady*.

Pudelski, dissent, p. 615.

Therefore, the dissent concluded, the matter should have been remanded to the district court with an order to hold a hearing in which the production of the document in question could be obtained and the significance of it could be fully explored. *Id.*, at 616.

The dissent also concluded that the report was material under *Agurs*, 427 U.S. at 112-113

> If Balraj's testimony had played a limited role in the determination of guilt, there would be considerable doubt as to whether non-disclosure of the report, and the concomitant limitations on Pudelski's attempts to impeach Balraj, were significant enough to "undermine confidence in the trial" as required in *Kyles*. *See id*. However, the circumstantial nature of the case against Pudelski and the centrality of Balraj's testimony both weigh in favor of a finding that any potential impeachment evidence would have been material.

Pudelski, dissent, p. 617-18.

As noted above, the Sixth Circuit found that "[t]he trial court did not abuse its discretion or misapply Ohio law when denying Pudelski's motion for new trial, and the denial of the motion did not infringe on Pudelski's due process rights or his right to a fundamentally fair trial." *Pudelski*, p. 576. This finding was made without actually viewing the disputed reports. Thus, it appears that the Sixth Circuit based its decision, in part, in deference to the Ohio appellate court findings. To do so without considering the document in question not only violates 28 U.S.C. § 2254(d), (e)(1) (2006), but also the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Petitioner John Pudelski prays that this Court grant his petition for writ of certiorari to address the questions presented and determine whether the Sixth Circuit Court of Appeals invoked an incorrect standard of review in affirming the denial the his petition for the issuance of a writ of habeas corpus.

Respectfully submitted,

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APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-3856

[Filed August 14, 2009]

JOHN J. PUDELSKI, *Petitioner-Appellant,*

v.

JULIUS WILSON, *Respondent-Appellee.*

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 02-01441—Donald C. Nugent, District Judge.

Argued: April 22, 2009

Decided and Filed: August 14, 2009

Before: CLAY and McKEAGUE, Circuit Judges; HOLSCHUH, District Judge.*

COUNSEL

ARGUED: Edwin J. Vargas, THE VARGAS LAW FIRM, Cleveland, Ohio, for Appellant. Thelma Thomas Price, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Edwin J. Vargas, THE VARGAS LAW FIRM, Cleveland, Ohio, for Appellant. Thelma Thomas Price, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

HOLSCHUH, D. J., delivered the opinion of the court, in which McKEAGUE, J., joined. CLAY, J. (pp. 26-32), delivered a separate dissenting opinion.

OPINION

HOLSCHUH, District Judge. Petitioner John J. Pudelski ("Pudelski") was convicted in state court of the murder of his infant daughter, and after appealing that conviction to the state courts he filed a 28 U.S.C. § 2254 petition for habeas corpus relief. The district court, adopting the magistrate judge's Report and Recommendation in full, found no merit in Pudelski's claims and dismissed the petition. Pudelski now appeals. Although the magistrate judge and district

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* The Honorable John D. Holschuh, United States District Judge for the Southern District of Ohio, sitting by designation.

court improperly found that habeas relief was not available to Pudelski on his first ground for relief, we reach the merits of that ground and find that it does not warrant habeas relief. Additionally, we find no merit in Pudelski's second ground for relief, and consequently we affirm the dismissal of Pudelski's habeas petition.

I.

The Ohio Eighth District Court of Appeals found the following facts on direct appeal, and we accept them as true because they are unrebutted, *see* 28 U.S.C. § 2254(e)(1):

> John J. Pudelski was charged in a two-count indictment filed April 14, 1999. Count one charged him with aggravated murder in violation of R.C. 2903.01 specifically, purposely causing the death of his infant daughter, Ellie Marie Pudelski. Count two charged him with murder; that is, causing the infant's death as a proximate result of committing or attempting to commit felonious assault, a first or second degree felony that is an offense of violence.
>
> [Pudelski] moved the court to suppress oral statements he made to the police, to dismiss the death penalty specification on count one, and to dismiss the murder charge contained in count two of the indictment. After a hearing on the motion to suppress, the court denied all three motions. However, the state was given leave to remove the death penalty specification from the indictment on July 23, 1999.

The case proceeded to trial on August 23, 1999. In addition to the charges of murder and aggravated murder, the jury was also instructed on the lesser included offense of involuntary manslaughter as a proximate result of child endangering. The jury returned a verdict finding [Pudelski] not guilty of aggravated murder but guilty of murder. The court sentenced him to fifteen years' [sic] to life imprisonment and overruled his motions for acquittal and for a new trial. [Pudelski] timely appealed his conviction and the denial of his post-verdict motions.

In the state's case at trial, the jury heard testimony from [Pudelski's] wife (who was also the mother of the infant victim), medical personnel involved in the delivery and postnatal care of the infant, paramedic and emergency room personnel who responded to the 9-1-1 call regarding the child's death, the county coroner and assistant coroner, and a police officer who investigated the matter.

The mother testified that the infant girl was delivered by Caesarian section on March 17, 1999, and she took her home four days later. The infant fed [sic] every four hours, approximately two and one-half to three ounces of formula or breast milk at each feeding, and behaved normally. The mother never noticed any injury to the infant's head.

The neonatologist who was present at the infant's birth had noted a caput or bruise under the scalp but above the skull bone on the back of

her head. This is a common injury in newborns and does not have any serious effects on the infant's health. A pediatrician who saw the infant on March 18 and 20 reported that he saw no abnormalities. He would not necessarily have noted a caput in his records unless it was an unusual one. He did not note one here. Neither physician noted any cepahlohematoma, or swelling and bleeding of the tissue under the bone, which would have been a more serious injury. A home nurse reported that the baby appeared normal and had no bumps or bruises on her head when the nurse saw her on March 23.

The mother testified that the baby behaved normally throughout the day of Sunday, March 28, 1999. The mother fed her at 8:00 or 9:00 p.m.; the baby consumed almost three and one-half ounces at that time. The mother put the baby to bed at approximately 9:30 p.m., then took a cough medication, Nyquil, and went to bed herself. The baby's crib was located in the mother's bedroom.

The mother awakened around 12:00 midnight when the baby cried and got up to feed the child. [Pudelski], her husband, was not in the room when the mother awakened but came in and offered to feed the baby, although he normally went to bed at that time. This was the first time he had fed the baby; he normally paid no attention to her. The mother then went back to sleep.

The mother awakened at 7:00 a.m. and was immediately concerned because the child had not awakened for her normal feeding at 4:00 a.m. She went to the crib and found the baby in a corner with her head against the bumper pad. Her forehead was cold. The mother picked the baby up and felt for a heart beat but felt none. She observed a lump on the side of the baby's head.

The mother began to yell for [Pudelski] to wake up. It was unusual for [him] to be sleeping at this time; he was usually up at 6:30 a.m. [Pudelski] jumped up and took the baby from the mother and left the room, returning with the telephone. He ordered the mother to leave the bedroom and wait in the living room for paramedics to arrive.

Paramedics came and took the baby to Euclid Hospital. [Pudelski] and his wife delayed going to the hospital while [Pudelski] woke his two daughters from a prior marriage and readied them for school, then took them to his mother's house. [Pudelski] and his wife proceeded from there to the hospital.

At the hospital, they learned that the baby was dead. They went into a room to see the body, but [Pudelski] would not look at her. As they waited in the grieving room for the mother's mother to arrive, [Pudelski] said to his wife, Please don't leave me.

The coroner and assistant coroner testified that the baby died as a result of a cerebral

edema, or swelling of the brain, which was caused by a blunt impact that also caused a fracture of the skull. They estimated the time of death at approximately 3:00 a.m., and approximately two to three hours after the injury was inflicted. They opined that she was injured after her midnight feeding. The assistant coroner testified that the child would have survived if medical attention had been sought immediately after the injury occurred.

The coroner and assistant coroner both opined that the fracture occurred very recently, certainly less than twenty-four hours before the baby's death. There were no signs of healing around it; the edges of the break were sharp and uncalloused and there was fresh blood at the site. There were no macrophages (clean-up cells) at the site of the fracture, though there were some in the adjacent scalp. They opined that these macrophages were present because of the caput that occurred at birth. There was no evidence the fracture was a new break at the same site as a fracture that had occurred earlier. Macrophages would have been present at the fracture site if the fracture were [sic] not new. The fracture could not have occurred after death because the body had to have been alive to pump the fresh blood that had oozed around the area.

The coroner opined that the death was a homicide. She reached this conclusion because the child had a fracture that was not a birth injury, she could not have caused the fracture

herself, and nothing accidental had happened, so the injury had to have been inflicted.

Detective Raymond Jorz testified that [Pudelski] and his wife came in to the police station together voluntarily on March 31, 1999, and were interviewed separately. [Pudelski] was interviewed by Detective Jorz and Lieutenant Brooks. They asked [Pudelski] whether the baby had suffered any accidental injuries, and [Pudelski] said she had not. [Pudelski] related that he had fed the baby around midnight and stayed up with her until approximately 1:30 a.m., then put her in the crib after she went to sleep. He went to bed himself and awakened at approximately 3:30 a.m., used the bathroom, then returned to bed. He did not check on the baby at that time. His wife woke him up the following morning after she had found the baby cold and unresponsive.

When police informed [Pudelski] that the baby had a skull fracture, [Pudelski] suggested that the fracture was caused by the emergency medical technicians or that the coroner was examining the wrong child. He denied knowledge of any injury.

State v. Pudelski, No. 77172, 2001 WL 259215, at **1-3 (Ohio Ct. App. Mar. 15, 2001).

The jury convicted Pudelski of one count of murder, in violation of R.C. 2903.02(B), on September 4, 1999. He filed a motion for a judgment of acquittal or for a new trial on September 10, 1999, arguing that the verdict was not sustained by sufficient evidence and

was rather based on impermissible double inferences. JA 90-104. The trial court overruled this motion on September 17, 1999, and on the same day sentenced Pudelski to 15 years to life in prison. JA 112.

Pudelski then filed a motion for a new trial based on newly discovered evidence pursuant to Ohio Criminal Rule 33(A)(6) on October 1, 1999. The day before his sentencing, Pudelski's mother had discovered an undeveloped roll of film in her house that, when developed, contained photographs of Pudelski's daughter the day after her birth. One photograph showed a large red bruise on the back right side of the infant's head which, according to Pudelski, corresponds to the area in which the skull fracture that ultimately killed the child had occurred. Pudelski argued that this photograph was new evidence proving that the infant suffered a "significant injury" during birth. His expert witnesses had theorized at trial that such an injury had occurred but could offer no definitive proof of it, a fact that the State emphasized in its closing arguments. Pudelski argued that this injury, as shown on the photograph, actually caused the infant's eventual death, thus exonerating him. Pudelski relied entirely on state law when making his motion, most notably Ohio Criminal Rule 33(A)(6) and *State v. Petro*, 148 Ohio St. 505, 76 N.E.2d 370 (1947).[1] JA 113-26.

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[1] Ohio Criminal Rule 33(A)(6) states: "A new trial may be granted on motion of the defendant . . . (6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial." *State v. Petro* states: "To warrant the granting of a motion for a new trial in a criminal case, based on the ground of newly discovered evidence, it must be shown that the new evidence (1)

The State opposed the motion on the grounds that the photograph did not have a strong probability of changing the outcome of the trial, and that the photograph was cumulative evidence. JA 135-53. The State argued that numerous witnesses present for the child's delivery noted the presence of a large bruise or caput on the back right side of the infant's head, making the photograph cumulative evidence. The trial court denied the motion on December 17, 2000 on the grounds that the photograph was cumulative to the trial testimony establishing that the infant did in fact have a large bruise or caput on her head when born. The trial court also concluded that the photograph would not have changed the outcome of the trial. JA 1728-33. The trial court, like Pudelski, relied solely on Ohio law when denying Pudelski's motion for new trial.

Pudelski appealed his conviction to the Eighth District Court of Appeals on October 28, 1999, and because his motion for a new trial based on newly discovered evidence was still pending he moved for a stay of the appeal. Appellee Br. p. 9. The court of appeals granted that motion and, after the motion for a new trial was resolved and after Pudelski supplemented the appellate record, the court of appeals heard the appeal. *Id.* Pudelski raised eight assignments of error on appeal; most relevant to the

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discloses a strong probability that it will change the result if a new trial is granted, (2) has been discovered since the trial, (3) is such as could not in the exercise of due diligence have been discovered before the trial, (4) is material to the issues, (5) is not merely cumulative to former evidence, and (6) does not merely impeach or contradict the former evidence." 148 Ohio St. at 505 (syllabus).

instant habeas petition, Pudelski argued that the trial court erred when denying his motion for a new trial based on newly discovered evidence, and that the trial court abused its discretion and prejudiced him when ruling on various evidentiary issues, including a ruling denying him the opportunity to review the police report upon which the coroner relied in reaching her conclusions and in admitting the coroner's expert testimony. Pudelski relied entirely on state law when arguing for relief based on these two assignments of error. With respect to the denial of his motion for new trial, Pudelski again relied on Ohio Criminal Rule 33(A)(6) and *State v. Petro*. With respect to the admission of the coroner's expert testimony and the denial of his request to review the police reports, Pudelski relied on Ohio evidentiary law. JA 166-88.

The court of appeals affirmed the trial court in all respects in an opinion issued on March 15, 2001 and journalized on April 3, 2001. *Pudelski*, 2001 WL 259215; JA 166-88. The court of appeals found that the newly discovered photograph was cumulative; that the trial court did not abuse its discretion in denying the motion for a new trial; and that the trial court did not abuse its discretion in ruling on the evidentiary issues. *Id.* The court of appeals, like Pudelski, relied on and interpreted only state law when affirming the trial court. Pudelski filed a motion for reconsideration and a motion to reopen the appeal, both of which the court of appeals denied, Appellee Br. p. 12-14, and he also filed an appeal to the Supreme Court of Ohio, JA 189. As on direct appeal, Pudelski relied entirely on state law when seeking review by the Supreme Court of Ohio. JA 189-204. The Supreme Court of Ohio declined to exercise jurisdiction on July 25, 2001, *State v. Pudelski*, 92 Ohio St. 3d 1445, 751 N.E.2d 483 (Table)

(2001), and denied Pudelski's motion for reconsideration on October 10, 2001, *State v. Pudelski*, 93 Ohio St. 3d 1453, 756 N.E.2d 116 (Table) (2001).

Pudelski then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio on July 25, 2002. JA 7. In the petition, Pudelski presented five grounds for relief:

1. The Trial Court Erred in Denying [Pudelski's] Motions for New Trial Based on Newly Discovered Evidence.

2. The Trial Court Erred in Prohibiting [Pudelski] and His Trial Counsel from Having Access to the Files and Records upon Which the State's Expert Witness Relied in Her Expert Testimony.

3. The Trial Court Erred in Allowing the Prosecution's Witness, Assistant County Coroner, Dr. Joseph Felo to Testify Relative to His Unscientific and Personal Research in a Manner So as to Present Such Research as Scientific Evidence.

4. The Trial Court Erred in Denying Petitioner's Motion to Dismiss Count 2 of the Indictment - as Death Resulting from Felonious Assault Constitutes Involuntary Manslaughter in Violation of R.C. 2903.04(a), Which [sic] Precludes an Indictment for Murder under R.C. 2903.02(b) under Ohio Law.

5. The Trial Court Erred in Refusing the Jury's Request - Based upon Inconvenience to the

> Court - to View Microscope Slides Which Had Been Admitted into Evidence and Had Been Delivered to the Jury for Use During its Deliberations.

JA 7-15. Pudelski moved to stay the habeas proceedings, however, to allow him to return to state court to exhaust state remedies that he conceded were available and unexhausted relative to his fifth ground for relief. The district court granted this motion on March 20, 2003, JA 289-90, and on April 21, 2003 Pudelski filed a petition to vacate or set aside the judgment in the state trial court pursuant to R.C. § 2953.21, based on the arguments presented by his fifth ground for habeas relief, Appellant Br. p. 3. The state trial court denied the petition on February 16, 2005. Pudelski appealed this denial to both the Eighth District Court of Appeals, which affirmed the trial court, *State v. Pudelski*, No. 85989, 2006 WL 440271 (Ohio App. 8th Dist. Feb. 23, 2006), and the Supreme Court of Ohio, which declined to exercise jurisdiction, *State v. Pudelski*, 110 Ohio St. 3d 1439, 852 N.E.2d 188 (Table) (2006).

Pudelski then returned to district court and moved to lift the stay, which motion was granted on February 20, 2007. JA 271. The magistrate judge issued a Report and Recommendation on April 24, 2007, recommending that the district court deny Pudelski's petition in its entirety. JA 263-88. With respect to the first ground for relief, the State argued that the district court did not have jurisdiction over that claim because it presented a question of state law only and did not claim that Pudelski was in custody in violation of federal law. The magistrate judge found that the district court did in fact have jurisdiction over the first

ground for relief because Pudelski "frame[d] his first ground for relief as a federal claim" by arguing that the denial of the motion for a new trial denied him a fundamentally fair trial and thus violated his right to due process. JA 272. The magistrate judge, however, then found that the court could not grant Pudelski relief on this ground because this ground for relief alleged a constitutional violation in the ruling on his motion for a new trial, which the magistrate judge found was a post-conviction proceeding. The magistrate judge relied on *Kirby v. Dutton*, 794 F.2d 245, 246-47 (6th Cir. 1986), for the proposition that federal habeas relief is not available to remedy alleged errors in state post-conviction proceedings, and recommended that the district court deny Pudelski's first ground for relief. JA 273-74. The magistrate judge did not reach the merits of Pudelski's first ground for relief.

Turning to Pudelski's other grounds for relief, the magistrate judge first addressed the State's claim that Pudelski had procedurally defaulted those grounds. The magistrate judge held that Pudelski had exhausted his state remedies because he had none remaining, JA 275, and then addressed the issue of procedural default. The magistrate judge did not explicitly conclude that Pudelski had in fact procedurally defaulted any grounds for relief, but rather concluded that any procedural default should be excused pursuant to *Schlup v. Delo*, 513 U.S. 298, 320-21 (1995) (stating that a federal habeas court must consider the merits of procedurally defaulted claims when failure to do so would result in a fundamental miscarriage of justice) because, in the magistrate judge's opinion, Pudelski had made at least a colorable claim of actual innocence. The magistrate judge thus

examined the merits of Pudelski's remaining grounds for relief. JA 275-77.

The magistrate judge recommended denying Pudelski's second ground for relief because, even assuming that the trial court's decision to prevent Pudelski from reviewing the police report on which the coroner relied to give her expert opinions violated Ohio's evidentiary rules, the magistrate judge concluded that the ruling did not deprive Pudelski of due process and a fundamentally fair trial. JA 281. The magistrate judge found that the information contained in the police report was presented and available for examination during the trial by other means, and that granting Pudelski access to the police report would not have changed the outcome of the trial. The magistrate judge also found that the trial court's decision did not violate *Brady v. Maryland*, 373 U.S. 82 (1963), because there was no indication that the police report contained information favorable to Pudelski. JA 282. The magistrate judge recommended that the district court deny Pudelski's other three grounds for relief on the grounds that he had not shown that the alleged errors in the trial violated due process and made the trial fundamentally unfair. JA 283-88.

Pudelski objected to the magistrate judge's conclusions and recommendations. JA 294. The district court reviewed the Report and Recommendation and the petition de novo, and on May 30, 2007 issued its opinion. The district court found no merit in Pudelski's objections and thus overruled them, instead adopting the magistrate judge's Report and Recommendation in full and denying Pudelski's petition for a writ of habeas corpus. Additionally, the district court refused

to issue a certificate of appealability after finding that an appeal could not be taken in good faith. *Pudelski v. Wilson*, No. 1:02-cv-1441, 2007 WL 1592099 (N.D. Ohio May 30, 2007). Pudelski appealed to this Court on June 18, 2007 and moved for a certificate of appealability, which this Court granted only as to the first two grounds for relief in the habeas petition.

II.

We discuss first the issue of procedural default. Ordinarily, state prisoners must exhaust available state remedies by, among other things, fairly presenting their federal claims to the state courts before petitioning for a federal writ of habeas corpus. *See* 28 U.S.C. § 2254(b), (c); *Whiting v. Burt*, 395 F.3d 602 (6th Cir. 2005). Due to longstanding policies of comity and respect between state and federal courts, a habeas petitioner must give the state courts the first opportunity to consider and rule upon the federal claims the prisoner wishes to use to attack his state court conviction. *Picard v. Connor*, 404 U.S. 270, 275 (1971). A petitioner need not cite federal law "book and verse" to fairly present a claim, *id.* at 278, but the factual and legal underpinnings of the claim must be presented as a federal claim to the state courts, *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000).

In situations in which a petitioner has failed to fairly present federal claims to the state courts, and a state procedural rule now prohibits the state court from considering them, the claims are considered procedurally defaulted. *Martin v. Mitchell*, 280 F.3d 594, 603 (6th Cir. 2002). While in such situations the exhaustion requirement is technically satisfied

because there are no longer any state remedies available to the petitioner, *see Coleman v. Thompson*, 501 U.S. 722, 732 (1991), the petitioner's failure to have the federal claims considered in the state courts results in a procedural default of those claims that bars federal court review. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006).

In this case, it appears that both of Pudelski's claims are procedurally defaulted because he failed to timely present them as federal claims to the state courts. Pudelski has framed his claims to the district court and this Court as federal claims, but before the state courts he framed his arguments solely in terms of Ohio law governing motions for new trial and evidentiary issues and never argued that any of his federal rights had been violated. The Sixth Circuit has identified four actions significant to determining whether a claim has been fairly presented to the state courts, *see McMeans*, 228 F.3d at 681 (relying on federal cases employing constitutional analysis, relying on state cases employing federal constitutional analysis, phrasing the claim in terms of constitutional law, or alleging facts well within the mainstream of constitutional law), and a review of the record reveals that Pudelski has taken none of these actions. Counsel for Pudelski conceded as much during oral argument, but contended that Pudelski's federal fair trial and due process claims were "pervasive" throughout his state court arguments. However, "[g]eneral allegations of the denial of rights to a 'fair trial' and 'due process' do not 'fairly present' claims that specific constitutional rights were violated." *Id.* Furthermore, state procedural rules now prohibit Pudelski from attempting to raise his federal arguments before the state courts, as he has already taken his direct appeal

and the time for either moving to reopen the appeal or for filing a state habeas corpus petition has expired. *See* Ohio Rule of Appellate Procedure 26(B); Ohio Rev. Code § 2953.21(A)(1)(a). Pudelski's claims, while technically exhausted, would thus appear to be procedurally defaulted.

However, exhaustion and procedural default are not jurisdictional limitations, *see Cain v. Redman*, 947 F.2d 817, 820 (6th Cir. 1991), and in this instance we elect to excuse the apparent default. Although the State argued procedural default to the district court and magistrate judge, the State did not renew this issue on appeal and the parties have not briefed it. Based on the record before us we decline to decide the issue and decline to dismiss Pudelski's petition for procedural default, especially because we find that the district court's opinion dismissing Pudelski's petition can be affirmed on the merits. *See, e.g., Linscott v. Rose*, 436 F.3d 587, 592 (6th Cir. 2006).[2]

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[2] The magistrate judge and district court also excused any procedural default Pudelski may have committed, but on the ground that Pudelski had made at least a "colorable" showing of actual innocence that, pursuant to *Schlup v. Delo*, 513 U.S. 298 (1995), allowed Pudelski's claims to be considered on their merits in order to avoid a fundamental miscarriage of justice. JA 275-77. Although we too excuse Pudelski's procedural default, we take this opportunity to note that the magistrate judge misapplied *Schlup*. A federal court has a duty to consider the merits of a procedurally defaulted claim if failure to do so would result in a fundamental miscarriage of justice. This exception to the procedural default rule, however, is exceedingly narrow and is reserved for extraordinary cases in which a petitioner can show that a constitutional violation has probably resulted in the conviction of a factually innocent person. *Schlup*, 513 U.S. at 321; *Murray v. Carrier*, 477 U.S. 478, 496 (1986). To establish a claim

III.

The magistrate judge and district court both found that habeas relief was not available to Pudelski on his first ground for relief for the reason that federal habeas relief is not available to remedy alleged errors in state post-conviction proceedings. We hold, however, that motions for new trial filed before a state defendant initiates his or her state direct appeal, and subsequently reviewed during that direct appeal, are not post-conviction proceedings and do not preclude a federal habeas court from reviewing the denial of the motion for new trial for constitutional error. However, on the merits, we find that Pudelski was not denied due process or a fundamentally fair trial when his motion for new trial was denied. Additionally, we find that Pudelski's second ground for relief is meritless, as the state trial court's evidentiary rulings did not deny Pudelski a fundamentally fair trial and did not violate *Brady v. Maryland*.

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of actual, factual innocence, the petitioner must present new evidence that "show[s] that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327. The Supreme Court has recently stated that "it bears repeating that the *Schlup* standard is demanding and permits review only in the 'extraordinary' case." *House v. Bell*, 547 U.S. 518, 538 (2006). The magistrate judge's finding that Pudelski's "at least colorable" actual innocence claim satisfied this demanding standard was erroneous; a claim of actual innocence must be more than simply "colorable" to invoke the *Schlup* gateway. Furthermore, as we explain below in section III.B.2, even if the magistrate judge had applied the proper standard, Pudelski's new evidence does not make it more likely than not that no reasonable juror would have convicted him and thus does not satisfy the *Schlup* standard.

A. Standard of Review

A district court's decision to grant or deny a habeas petition is reviewed de novo. *Northrop v. Trippett*, 265 F.3d 372, 376 (6th Cir. 2001). A federal court's analysis of a habeas petition challenging a state court decision is governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). That statute, in relevant part, amended 28 U.S.C. § 2254(d) to read:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

The relevant state court decision is the last state court to adjudicate the claim on the merits, and this court reviews the decision of "the last state court to issue a reasoned opinion on the issue." *Joseph v. Coyle*, 469 F.3d 441, 450 (6th Cir. 2006). In this case, that is the Eighth District Court of Appeals' decision, because the Ohio Supreme Court declined to review Pudelski's claims without comment.

Section 2254(d)(1) contains two separate clauses: a "contrary to" clause, and an "unreasonable application"

clause. *Williams v. Taylor*, 529 U.S. 362, 404-5 (2000). A state court's decision would be considered "contrary to" established law if it is "diametrically different" from or "opposite in character or nature" to federal law as determined by the Supreme Court. *Id.* at 405. A "run-of-the-mill state-court decision applying the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." *Id.* at 406.

However, such a "run-of-the-mill" decision could warrant habeas relief if it involved an "unreasonable application" of clearly established federal law as determined by the Supreme Court. If a state court decision correctly identifies the governing federal law but applies that law to the facts before it in an "objectively unreasonable" way, habeas relief would be appropriate. "Unreasonable" does not mean "incorrect;" "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411.

The state court decision must also be contrary to or an unreasonable application of clearly established Federal law, "as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). The *Williams* Court clarified that "[this] statutory phrase refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. The Supreme Court need not have specifically addressed a particular set of facts to have clearly established federal law, however, because "[t]he Court has made clear that its relevant precedents include not

only bright-line rules but also the legal principles and standards flowing from precedent." *Gray v. Moore*, 520 F.3d 616, 621 (6th Cir. 2008); *see also Panetti v. Quarterman*, 551 U.S. 930 (2007).

B. First Ground for Relief

1. Availability of Habeas Relief

The magistrate judge found that habeas relief was not available to Pudelski on his first ground for relief because he alleged error in the proceedings related to his motion for new trial, which the magistrate judge considered a post-conviction proceeding. This is a legal determination that is reviewed de novo. *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999). Pudelski argues, and the State agrees, that the magistrate judge improperly found that the motion for new trial constituted a post-conviction proceeding. Appellant Br. p. 17-19; Appellee Br. p. 23-24. We agree with the parties and have concluded that Pudelski's motion for new trial was not a post-conviction proceeding, and that his claim in this particular case is reviewable as a habeas claim.

The magistrate judge relied on *Kirby v. Dutton*, 794 F.2d 245 (6th Cir. 1986) for the proposition that habeas corpus relief is not available to challenge alleged errors in state post-conviction proceedings. Although *Kirby* is good law in the Sixth Circuit, in our opinion the magistrate judge misapplied *Kirby* to the facts of the present case. In *Kirby*, the petitioner filed a state post-conviction proceeding attempting to overturn his conviction of two counts of assault with intent to commit murder, and pursuant to Tennessee law the state court appointed counsel to represent the

petitioner in the post-conviction proceedings. The petitioner's post-conviction action was dismissed, and on appeal of that decision the petitioner alleged that his appointed counsel had rendered ineffective assistance in the post-conviction proceeding. The Tennessee appellate courts rejected the petitioner's appeals, and he then filed a petition for a writ of habeas corpus in federal court in the Middle District of Tennessee claiming ineffective assistance of counsel in violation of the Sixth Amendment. The district court denied the petition on the ground that the Sixth Amendment applied only to criminal proceedings, not post-conviction proceedings that were civil in nature, and the petitioner appealed to this court. *Id.* at 245.

On appeal, a panel of this court found that it was unnecessary to review the correctness of the district court's determination and instead held that the petitioner's claims could not be brought in a federal habeas corpus petition. *Id.* at 246. After noting that "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody," *id.* (*quoting Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973)), the court reasoned that allegations of constitutional violations in post-conviction proceedings did "not in any way [relate] to [the petitioner's] confinement," *id.* at 248, and did not come within the traditional scope of habeas corpus. The court "decline[d] to allow the scope of the writ to reach this second tier of complaints about deficiencies in state post-conviction proceedings," and affirmed the district court's denial of the petition. *Id.*

Kirby is inapplicable to this case. Pudelski filed his motion for a new trial based on newly discovered evidence, pursuant to Ohio Criminal Rule 33, on

October 1, 1999, two weeks after he was sentenced and before he commenced his direct appeal. JA 113. After he filed his direct appeal on October 28, 1999 he asked the Eighth District Court of Appeals to stay the appeal pending the resolution of his motion for new trial in the trial court, which the court of appeals granted. Once the trial court denied the motion for new trial, the court of appeals considered the denial of that motion along with and at the same time as Pudelski's direct appeal of his conviction. *See State v. Pudelski*, 2001 WL 259215.

Pudelski's pre-appeal motion for new trial was part of the original proceedings and was not collateral to his conviction or a post-conviction proceeding. A conviction is not final until all appeals are exhausted, and in this case Pudelski moved for a new trial before his direct appeal was even taken. The court of appeals, moreover, considered the trial court's denial of Pudelski's motion for new trial as part of his direct appeal of his conviction, which shows that Pudelski's motion for new trial was not a collateral attack on his conviction or a post-conviction proceeding.

Persuasive authority from other circuit courts considering motions for new trial filed under Federal Rule of Criminal Procedure 33, which is similar to Ohio Criminal Rule 33, supports this conclusion. The petitioner in *Kitchen v. United States*, 227 F.3d 1014 (7th Cir. 2000), had been convicted of cocaine and firearms charges in federal court, and he appealed his conviction to the Seventh Circuit Court of Appeals. While the direct appeal was pending, he filed a Rule 33 motion for new trial based on newly discovered evidence, and the Seventh Circuit stayed the appeal pending the resolution of the motion for new trial. *Id.*

at 1016-17. The district court denied the motion, and the petitioner desired to appeal that decision to the court of appeals. His attorney, however, inadvertently failed to file a notice of appeal, and the Seventh Circuit proceeded to consider the petitioner's direct appeal without considering the denial of the motion for new trial. The court of appeals affirmed the petitioner's conviction, and he then filed a § 2255 petition for a writ of habeas corpus, alleging ineffective assistance of counsel in violation of the Sixth Amendment for the failure to file the notice of appeal denying the Rule 33 motion. The district court denied the petition. *Id.* at 1017. The petitioner then appealed that decision to the Seventh Circuit.

The Seventh Circuit began by asking whether the petitioner had a right to the assistance of counsel during the Rule 33 motion for a new trial proceedings. Criminal defendants have a Sixth Amendment right to counsel from the time when proceedings have been initiated against them until the termination of the direct appeal, *id.* at 1018, and so the question of whether the petitioner had a right to the assistance of counsel depended on whether the Rule 33 motion for new trial was part of the initial proceeding or was a collateral proceeding. The court of appeals noted that the timing of the Rule 33 motion was "an important factor" in the decision, *id.*, and after noting that the petitioner filed his Rule 33 motion for new trial "well before the decision of his direct appeal," *id.*, held that

> it is wide of the mark to label a pre-appeal motion for a new trial as a "collateral attack." We have noted the converse proposition that "[w]hen made following the outcome of a direct appeal, a Rule 33 motion plainly is 'collateral' in

> the usual sense of that term." Here, however, [the petitioner's] direct appeal had not yet been decided, so his motion for a new trial clearly did not follow the outcome of his direct appeal. Instead we can say that his motion for a new trial was in aid of the appeal of the conviction and sentence. The conclusion that [the petitioner's] motion for a new trial was not a collateral attack is further supported by the procedural consideration that, had [the petitioner's] counsel filed a notice of appeal from the denial of the motion, the Rule 33 appeal could have been consolidated with [the petitioner's] direct appeal. It would make no sense to label a pre-direct appeal Rule 33 motion as a "collateral attack" on the conviction, when the appeal from such a proceeding could be consolidated with the direct appeal of the conviction. A properly denominated collateral attack on a defendant's conviction . . . could never be consolidated with the direct appeal, and is not even part of the criminal proceeding itself. Therefore, because [the petitioner's] motion for a new trial was decided before our decision in his direct appeal, it may not be deemed a "collateral attack" on his conviction[.]

Id. at 1019 (internal citations omitted). After finding the petitioner's counsel's performance deficient, the court of appeals affirmed the denial of the petition because the petitioner had not established prejudice. *See also United States v. Berger*, 375 F.3d 1223, 1226 (11th Cir. 2004) (*citing Kitchen* for the proposition that "[a] post-conviction, *pre*-appeal Rule 33 motion is considered part of a defendant's direct appeal" (emphasis in original)).

The facts surrounding Pudelski's motion for new trial are even more squarely in favor of finding that his motion for new trial is not a collateral proceeding than the facts in *Kitchen*. Unlike the petitioner in *Kitchen*, Pudelski filed his motion for new trial before even filing his direct appeal. Furthermore, unlike the petitioner in *Kitchen*, Pudelski did actually appeal the denial of his motion for new trial to the Eighth District Court of Appeals, which then did actually consolidate and consider that issue along with the rest of Pudelski's direct appeal. Pudelski's motion for new trial was not a collateral attack on his conviction: it was instead a part of the direct appeal of his conviction.

We hold that when a state defendant files a motion for new trial before filing a direct appeal, and when the denial of that motion is then consolidated with and reviewed during the direct appeal, the motion for new trial is part of the original criminal proceedings and is not a collateral proceeding. In such a situation the rule in *Kirby* is inapplicable. Because Pudelski filed his motion for new trial before he filed his direct appeal and the denial of that motion was reviewed during the direct appeal, the magistrate judge and district court erred in finding that the denial of his motion for new trial constituted a collateral proceeding. Habeas relief is available on Pudelski's first ground for relief.

2. Merits

On the merits of that ground for relief, however, habeas relief is not warranted. Pudelski's first ground for relief argues that the trial court abused its discretion and misapplied Ohio law when denying his motion for new trial based on newly discovered

evidence, and that this ruling and the Eighth District Court of Appeals' affirmance denied him due process of law. Pudelski does not cite to or identify any federal law that these rulings are contrary to or an unreasonable application of, and even though he invokes the concept of federal due process, his claim is clearly premised on issues of state law. State law issues are not subject to habeas review, *see Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), and this Court can review the denial of Pudelski's motion for new trial only for constitutional error. To establish a constitutional due process claim, Pudelski must demonstrate that the trial court's denial of his motion for new trial was "so egregious" that it violated his right to a fundamentally fair trial. *See Fleming v. Metrish*, 556 F.3d 520, 535 (6th Cir. 2009); *Baze v. Parker*, 371 F.3d 310, 324 (6th Cir. 2004).

The trial court's and court of appeals' rulings were not so egregious, because even if the new photograph of Pudelski's daughter had been presented at trial, reasonable jurors could still have found him guilty. At trial, the State's theory of the case was that the child died from a cerebral edema, or a swelling of the brain, as a result of a blunt impact that also caused a linear skull fracture on the back right side of the child's head. The assistant coroner who performed the autopsy and the coroner both testified that the skull fracture was a new injury, less than 24 hours old, based on their observations that there was fresh blood underneath the scalp, that there were no signs of healing at the site of the injury, that there was no scar tissue present, and that the edges of the fracture were sharp as opposed to dull, which are all consistent with a new as opposed to an old injury. Based on the fact that the child did not have any head injuries when her mother

went to bed, and on the fact that Pudelski fed the child at midnight, the State argued that Pudelski was responsible for causing the skull fracture and subsequent brain swelling.

Testimony from other witnesses, such as the medical personnel who delivered the child, had established the presence of a caput, or bruise, on the back right side of the child's head after birth, but the coroner and assistant coroner concluded that this bruise was a separate injury from the skull fracture. They reached this conclusion because, during the autopsy, the assistant coroner discovered the presence of macrophages, white blood cells that clean up cellular debris (including blood from a bruise), at the caput's location. Macrophages do not appear immediately and would not be present at the site of a new injury: in this case, no macrophages were present at the site of the skull fracture, indicating that it was a new injury separate from the bruise present at birth.

Pudelski's theory of defense was that the infant had suffered a head injury during birth that caused the skull fracture found by the assistant coroner during the autopsy. Pudelski argued that this fracture had nothing to do with the infant's death, which Pudelski attributed to sudden infant death syndrome. To support this theory, Pudelski presented expert testimony from Drs. Robert Kiwi, Jan Leestma, and Michael Baden. These doctors all testified that, in their opinion, the skull fracture occurred during the child's birth, and that the skull fracture had no relationship to the child's eventual death, the cause of which they considered undetermined. *See, e.g.*, JA 1286. None of the doctors was able to cite to any definitive evidence that the child suffered an injury

during birth; rather, they based their opinions on their review of the birth records and the autopsy report. The State focused on this lack of direct proof in its closing argument, and argued that no skull fracture was present at the time of the child's birth.

Pudelski now presents new evidence in the form of a photograph, taken a day after the infant's birth, showing a large bruise on the back right portion of the child's head. Pudelski argues that this photograph "conclusively proves" that his daughter was born "with a substantial head/skull injury in the exact location" of the skull fracture and blunt force injury that killed his daughter. According to Pudelski, "[t]he support the new photograph would add to [his] experts' testimony [who theorized but could not prove the existence of such an injury] discloses a strong probability that it would change the result if a new trial is granted." Appellant Br. p. 20, 24. We do not agree.

First, this photograph is not conclusive evidence that the child had a skull fracture at the time of her birth. Testimony at trial from one of Pudelski's own experts, Dr. Richard Kiwi, established that an x-ray is necessary to establish the presence of a linear skull fracture. JA 1277. This photograph is not an x-ray, and the mere depiction of a red bruise on the child's head does not establish that a skull fracture existed underneath the bruise. Given the fact that the bruise overlays the area in which the fracture was eventually found, the photograph may make it slightly more probable that a fracture existed at the time of birth. However, it does not conclusively establish that fact, as Pudelski argues, especially in light of the strong evidence that the State presented at trial, such as the lack of signs of healing and the sharp edges of the

fracture, indicating that the fracture was a new injury that had occurred within 24 hours of the child's death.

Second, this photograph is entirely cumulative. Pudelski's experts all opined at trial that the skull fracture existed at birth and did not contribute to the child's death, and the jury heard and rejected this theory. The photograph does not add anything of significance to the evidence and theories presented at trial. Moreover, testimony at trial had already established that the child had a large red bruise on the back right side of her head at birth, *i.e.* the caput testified to by the medical personnel who delivered the child. The jury thus already knew that such a bruise existed on the child's head at birth and could have considered the argument that the bruise indicated the existence of a skull fracture at birth, as Pudelski's experts opined. The jury was not convinced, however, and found that the skull fracture and resulting cerebral edema were new injuries. A photograph of the bruise, when direct testimony had already established its existence, adds nothing of significance to the evidence presented at trial and would not compel a juror to credit Pudelski's expert witness testimony and discredit the State's evidence.

Even if the jury had been presented with the photograph, Pudelski has not shown that the result of the trial would have been different. The trial court did not abuse its discretion or misapply Ohio law when denying Pudelski's motion for new trial, and the denial of the motion did not infringe on Pudelski's due process rights or his right to a fundamentally fair trial. The court of appeals' affirmance of the trial court's decision was reasonable and likewise did not deny Pudelski a fundamentally fair trial or violate his right

to due process of law. Pudelski is not entitled to habeas relief on his first ground for relief.

C. Second Ground for Relief

Habeas relief is also not warranted on the merits of Pudelski's second ground for relief. Pudelski makes two arguments. First, he argues that the trial court violated Ohio Rule of Evidence 703 in admitting the coroner's expert testimony when the police report supporting that testimony was not in evidence. Second, he argues that his lack of access to the police report denied him due process and violated *Brady v. Maryland* because the police report was favorable to the defense.

As for Pudelski's first argument, this again is an issue of state law that is not subject to habeas review. Only if Pudelski can show that this evidentiary ruling was so prejudicial that it violated his right to a fundamentally fair trial can he prevail. *See Fleming*, 556 F.3d at 535. A review of the record, however, reveals that the trial court's ruling did not prejudice Pudelski. When forming her expert opinion as to the cause of the infant's death, the coroner testified that she relied on the police report only to eliminate accident as the cause of death. The fact that the police report eliminated accident as the cause of death, however, had already been revealed at trial. The detective who investigated the infant's death testified that the investigation revealed no accident that could have caused the infant's death, and that this information was in the police report. The sources that the police investigation relied on to arrive at this conclusion included interviews of Pudelski and Pudelski's wife, information from the deputy coroner,

and information from the paramedics who arrived at Pudelski's home in response to the Pudelskis' emergency call. These individuals all testified at trial. Thus, given that the detective testified as to the contents of the police report and that the sources of information that supported the police report were all available for examination at trial, even if the trial court violated Ohio Rule of Evidence 703 (an issue as to which we express no opinion), we cannot conclude that the trial court's decision to deny Pudelski access to the police report itself prejudiced him in any way, much less was so prejudicial that it denied Pudelski a fundamentally fair trial.

Pudelski's second argument is that the trial court's ruling denying him access to the police report violated *Brady v. Maryland*. *Brady* stands for the proposition that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). A *Brady* claim has three elements: "The evidence at issue must be favorable to the accused either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Banks v. Dretke*, 540 U.S. 668, 691 (2004).

Pudelski's argument, however, is without merit. First, according to the testimony of the witnesses at the trial, the police report was not favorable to Pudelski, because it eliminated an innocent explanation for the infant's death by finding that her death was not caused by an accident. This evidence

helped to incriminate, not exculpate, Pudelski, as he was the last person to interact with the child before her death. The report also stated that Pudelski physically assaulted the infant, which again is not exculpatory. J.A. 1206-7. There is no indication that the police report itself contained any exculpatory information (and the dissent admits as much, *see* dissenting op. at 6).

Pudelski argues that having access to the police report would have allowed him to impeach the coroner at trial, and the Supreme Court has indeed recognized that impeachment evidence can fall within *Brady*'s rule. *See United States v. Bagley*, 473 U.S. 667, 676 (1985). Even if it is assumed that the police report contained potential impeachment evidence satisfying the first element of a *Brady* claim, however, Pudelski cannot establish that the suppression of that evidence resulted in prejudice. Prejudice to the petitioner, the third element of a *Brady* claim, is established only if the suppressed evidence is material; evidence is material under *Brady* only if it presents a "reasonable probability" that the outcome of the trial would have been different if the evidence had been disclosed. *Id*. at 682. Viewing the evidence presented at the trial in its entirety, there is no reasonable probability that the outcome of the trial would have been different if the actual police report itself had been presented and used for impeachment purposes.

During oral argument much was made of the fact that the police report is not in the record, and that neither party has actually reviewed the police report's contents. Pudelski argues that the court below could not have held that the police report did not contain exculpatory evidence without knowing what was

actually in the police report. Pudelski, however, bore the burden of establishing his *Brady* claim, including the burden of establishing that the police report contained material evidence. *See Carter v. Bell*, 218 F.3d 581, 601 (6th Cir. 2000). Pudelski has not presented any evidence tending to show that the police report contained material evidence; rather, all of the evidence in the record tends to show that multiple witnesses testified as to the contents of the police report, and that the police report simply eliminated accident as the cause of the infant's death. If Pudelski's attorney was denied an opportunity to view the police report, a denial he now claims was error, he should have had the police report made part of the record at trial so that its contents would be available to any reviewing court. Pudelski's attorney, however, did not do this, and we cannot change or remake the record that is presented to us on appeal.[3]

The dissent admits that the police report was "likely not *exculpatory*" but argues that "its impeachment value alone could render it material." Dissenting op. at 30 (emphasis in original). It is

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[3] The dissenting opinion states that it is untenable for the majority to "fault Pudelski for failing to produce a report that he himself requested but was denied." Dissenting op. at 32. This is a misreading of the majority opinion. We do *not* state that Pudelski himself had the burden of producing the report; rather, we state that Pudelski's attorney had the duty on behalf of his clinet to be sure that the disputed police report was made a part of the record of the trial. Normally, when a disputed item of evidence is excluded by the trial judge, a proffer is made regarding the excluded testimony or, in the case of a excluded document, the document itself is directed to be made a part of the record in order that a reviewing court can properly determine whether the trial court's ruling was correct.

undisputed, however, that neither the prosecuting attorney nor the defense attorney knows what is in the police report; nor does the district judge, and nor do we appellate judges. According to the oral arguments in this court, it is not even known whether the report exists any longer, or, if it does, who has possession of it. While the dissent indulges in speculation as to how the report might possibly have been favorable to the defense in the cross-examination of the county coroner, it is certainly more probable that the content of the report supports the coroner's testimony and was favorable to the prosecution. In fact, the dissent acknowledges that "Balraj's own statements make clear that the contested report implicated Pudelski as the perpetrator of a physical assault." Dissenting op. at 30.

As the dissent concedes, "[t]he most difficult question underlying Pudelski's *Brady* claim is whether the report was material," *i.e.* whether there is a "reasonable probability" that the result of the trial would have been different if the report itself had been physically produced, *United States v. Bagley*, 473 U.S. 667, 682 (1985), or that the defendant was denied a fair trial, *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Dissenting op. at 29. The dissent suggests various possibilities as to how the defense attorney - who cross-examined Balraj twice concering the report - possibly could have used the physical report for additional impeachment of Dr. Balraj's testimony.[4] It

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[4] Nearly fourty pages of the trial transcript deal with Pudelski's attorney's cross-examination of Dr. Balraj about the role the police report played in her investigation, what information was contained in the police report, and the extent to which her ultimate conclusion was based on information in the report.

is simply not reasonable to conclude that these hypothetical uses of the report, based on absolute speculation as to the contents of a report we have not seen, could even come close to meeting the burden that the law places on the petitioner to show that the police report contained material evidence.

Finally, the dissent refers to an alleged practice of this court to "routinely" remand "when it determines that consideration of additional evidence would help it render a proper decision." Dissenting op. at 32. It is hardly a "routine" practice, however, for an appellate court to remand a case in order to require that a search be made for a missing report, which was ordered excluded by the trial judge and not made a part of the record, for the purpose of finding the report and then including it in a reopened record and directing the district judge, after briefing and argument from the parties, to determine whether the state trial judge, following an extensive voir dire hearing, made a mistake in excluding the report.

Pudelski's second ground for relief does not merit habeas relief.

IV.

For the above reasons, the district court's dismissal of Pudelski's habeas petition is AFFIRMED.

DISSENT

CLAY, Circuit Judge, dissenting. I agree that the state court's denial of Pudelski's motion for a new trial based on newly discovered evidence did not violate Pudelski's due process rights, and I therefore join the majority's decision to affirm the district court's denial of habeas relief as to that claim. However, I disagree with the majority's analysis of Pudelski's claim that the prosecution violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose a police report that was provided to the state's expert witness. Taking into consideration the facts presented in this case, there is a reasonable likelihood that the report at issue could have been used to impeach a critical state witness who testified unequivocally as to the cause of the victim's death. However, because the contested report was never provided to Pudelski and is not part of the record in this case, no court has had an opportunity to properly assess its impeachment value in order to determine whether the prosecution withheld favorable and material evidence in violation of *Brady*. In light of these concerns, I decline to join the majority's decision to deny habeas relief as to that claim. Instead, I would remand with instructions that the state be required to produce the report so that the district court can evaluate whether non-disclosure of the report violated

clearly established federal law under *Brady*, 373 U.S. 83.[1]

I.

In *Brady*, the Supreme Court held that the prosecution has a duty to disclose evidence favorable to the defendant and material to his guilt and punishment, irrespective of the good faith or bad faith of the prosecution. *Id.* at 87. The Supreme Court has since held that the duty to disclose such evidence is applicable even if there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985). A *Brady* violation has three distinct components and Pudelski has the burden of showing (1) that the prosecution withheld evidence, (2) that the evidence was favorable to him, and (3) that the evidence was material. *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999); *Moore v. Illinois*, 408 U.S. 786, 794-795 (1972).[2]

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[1] As the majority notes, when Pudelski presented this claim to the state courts, he relied solely on Ohio law when arguing for relief. I agree that his claim appears to be procedurally defaulted, but I also agree with the majority's decision to excuse the apparent default. *See* slip op. at 11-12.

[2] The Supreme Court has explained that "[t]he term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence -- that is, to any suppression of so-called '*Brady* material' -- although, strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281.

A.

In the instant case, it is undisputed that the prosecution failed to disclose a police report that was provided to the state's expert witness. At trial, Pudelski requested a copy of the police report that had been reviewed by Dr. Elizabeth Balraj, Cuyahoga County Coroner ("Balraj"). The court allowed defense counsel to conduct a voir dire regarding the police report outside of the jury's presence, and Balraj testified that she had used the report in her review of the case. When asked by the court if there was "anything specific in the police report that caused you to render you medical opinions[,]" Balraj answered in the negative. (Joint Appendix ("J.A.") at 1165.) The trial court then denied Pudelski's motion to instruct the prosecution to disclose the report. This sequence of events establishes that the report at issue existed and that it was not disclosed to the defense. It is therefore clear that, at a minimum, the prosecution failed to disclose the contested report. *See Strickler*, 527 U.S. at 282 ("Two of those components [of a *Brady* violation] are unquestionably established by the record in this case. . . . [W]ith respect to [the] documents, there is no dispute about the fact that they were known to the State but not disclosed to trial counsel.").

B.

The salient questions then become whether the report contained evidence that was favorable to Pudelski and whether any such evidence was material. *See id.* As discussed above, the Supreme Court has made clear that "favorable" evidence encompasses impeachment evidence as well as exculpatory evidence. *Bagley*, 473 U.S. at 676 ("Impeachment evidence . . . as

well as exculpatory evidence, falls within the *Brady* rule."). This is because impeachment evidence, "if disclosed and used effectively . . . may make the difference between conviction and acquittal." *Id.; see also Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

In the instant case, it appears that the police report requested by the defense had potential impeachment value. At trial, the defense presented its own medical experts who had reviewed the infant's medical records and who unequivocally concluded that a birth injury was the cause of death. Balraj, in contrast, provided expert testimony that the infant died "as a result of a blunt impact to head" and that "the manner of death [wa]s homicide." (J.A. at 1161-62.) Because the cause of death was a central and disputed issue in the case, Balraj's testimony was critical.

On cross-examination, Balraj stated that she reviewed police reports received by her office and that the police investigation was one of the facts she relied upon to reach a conclusion as to the matter of death. She acknowledged that her coroner's verdict contained several references to an alleged assault by the father, which included a statement that "[t]he death in this case was the end result of blunt impact to head sustained when allegedly assaulted by her father." (J.A. at 1209.)

Based on this testimony, Pudelski had a viable argument that the coroner's findings were influenced

by the police report and that he could have used the report to impeach her impartiality and the basis for her conclusions. Consequently, this Court can fairly conclude the report was favorable. *See Harris v. Lafler*, 553 F.3d 1028, 1033 (6th Cir. 2009) ("Because *Brady* applies not only to exculpatory evidence but also to impeachment evidence, . . . and because Harris could have used these statements to cast doubt on the credibility of Ward's testimony, *Brady* covers the statements. Harris, then, satisfies the first two elements of a *Brady* claim[.]") (citation omitted).

C.

The most difficult question underlying Pudelski's *Brady* claim is whether the report was material. Favorable evidence is "material," and constitutional error results from its non-disclosure, if there is a "reasonable probability" that the result of the proceeding would have been different if the evidence had been disclosed to the defense. *Bagley*, 473 U.S. at 682. "*Bagley*'s touchstone of materiality is a 'reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

If Balraj's testimony had played a limited role in the determination of guilt, there would be considerable doubt as to whether non-disclosure of the report, and the concomitant limitations on Pudelski's attempts to impeach Balraj, were significant enough to "undermine confidence in the trial" as required in *Kyles*. *See id.*

However, the circumstantial nature of the case against Pudelski and the centrality of Balraj's testimony both weigh in favor of a finding that any potential impeachment evidence would have been material. *See Agurs*, 427 U.S. at 112-113 ("The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. . . . [T]he omission must be evaluated in the context of the entire record.") Here, the state had no physical evidence linking Pudelski to the crime, and the jury obviously credited Balraj's expert testimony over the testimony of Pudelski's medical experts. As the Supreme Court has noted, in a case like this, where "the verdict is already of questionable validity," evidence is more likely to be material because "additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.*

The prosecution and defense disagree as to how effective the police report would have been as an impeachment tool. The majority asserts that "all of the evidence in the record tends to show that multiple witnesses testified as to the contents of the police report, and that the police report simply eliminated accident as the cause of the infant's death." Slip op. at 24. However, Balraj's own statements make clear that the contested report implicated Pudelski as the perpetrator of a physical assault. Balraj acknowledged that her coroner's verdict contained several references to an alleged assault by the father and included a statement that "[t]he death in this case was the end result of blunt impact to head sustained when allegedly assaulted by her father." (J.A. at 1209.) The report therefore did more than "eliminate accident as a cause of death." To the contrary, it put before the coroner the police investigator's conclusion that the

infant had been physically assaulted by her father. Even if the report was likely not *exculpatory*, its impeachment value alone could render it material. *See Bagley*, 473 U.S. at 684.

Pudelski's attorney could have used this report and Balraj's references to it in her coroner's verdict to suggest that Balraj conducted her investigation with a preconceived notion that a homicide had occurred. He also could have used the report to impeach Balraj as to the accuracy of her representation of the report. Without the police report, defense counsel had no way of challenging whether the report said more than or less than what Balraj said it did and the extent to which the report may have influenced her medical findings. As noted above, when asked about the report in voir dire, Balraj stated that she used the report only to eliminate accident as a cause of death. On cross-examination, however, she conceded that her coroner's verdict contained several references to an alleged assault by the father and concluded that "[t]he death in this case was the end result of blunt impact to head sustained when allegedly assaulted by her father." (J.A. at 1209.) This concession suggests that Balraj had understated the role that the report played in her verdict until she was confronted with contradictory evidence. It is likely that other discrepancies about Balraj's portrayal of and use of the report could be discovered only through access to the report itself. There is therefore no dispute as to the report's critical relationship to the issues presented by this case.

Although Pudelski has been denied an opportunity to review the report, the majority believes that Pudelski should be denied access to it unless he can specifically explain in advance why the report might

have made a difference to his defense. The unfairness of demanding that Pudelski address his arguments to the particulars of a report that he has not seen is evident. As a result, Pudelski has been left in the untenable position of being a defendant who has made available to the prosecution at trial his experts, their reports, and the evidence they used to reach their conclusions, but has been denied the reciprocal right to have access to the police report utilized by the prosecution's expert with respect to the same issues. Pudelski was therefore unable to fully and effectively challenge the extent to which the report may have influenced Balraj's conclusions and to have the jury determine whether her conclusions could be sustained to a reasonable degree of medical certainty.

D.

At oral argument, there was discussion as to whether Pudelski, the habeas petitioner, bore the burden of producing the report. The majority concludes that he did. In support of this conclusion, the majority asserts that "Pudelski has not presented any evidence tending to show that the police report contained material evidence" and that Pudelski "should have had the police report made part of the record at trial so that its contents would be available to any reviewing court." Slip op. at 23-24.

I disagree with these assertions on two bases. First, Pudelski in fact did present evidence tending to show that the report contained material evidence because, as discussed above, he presented evidence that Balraj considered the police report in reaching her conclusions and rendering a cause of death. (*See* J.A. at 1209.) Second, it is undisputed that Pudelski

requested the report at trial and made significant efforts to alert the court to the value of the report in his defense. It is unclear how Pudelski could have "had the police report made part of the record at trial," *see* slip op. at 24, when he was denied a copy of the report even though he explicitly requested it at trial. While it is true that Pudelski bears the burden of establishing that the report was material, *see Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998), this burden does not logically translate into a conclusion that Pudelski also bears the burden of producing a report to which he was denied access. Just as the Supreme Court has stated that a rule that "'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process[,]" *Banks v. Dretke*, 540 U.S. 668, 696 (2004), it is equally untenable to fault Pudelski for failing to produce a report that he himself requested but was denied.

While it might have been preferable for Pudelski to have requested this report again in proceedings before the district court, his failure to do so does not preclude us from remanding for further fact finding. The critical point is that Pudelski requested that the report be provided to him at his state court trial; and Pudelski preserved the *Brady* issue with respect to having been denied the report in his arguments before the district court. The majority states that "we cannot change or remake the record that is presented to us on appeal[,]" slip op. at 24, but this Court has broad discretion to order a remand, can require further proceedings that it deems "just under the circumstances," 28 U.S.C. § 2106, and routinely does so when it determines that consideration of additional evidence would help it render a proper decision. Under the circumstances

presented in this case, I conclude that a remand for additional fact finding is the just and proper course.

II.

In light of the aforementioned concerns, I disagree with the majority's decision to deny habeas relief with respect to Pudelski's *Brady* claim. Instead, I would remand with instructions that the state be required to provide the contested report to the district court, and that the district court evaluate whether the failure to disclose the report violated clearly established federal law under *Brady*, 373 U.S. 83. I therefore respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-3856

[Filed August 14, 2009]

JOHN J. PUDELSKI, Petitioner-Appellant,

v.

JULIUS WILSON, Respondent-Appellee.

Before: CLAY and McKEAGUE, Circuit Judges; HOLSCHUH, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Northern District Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court dismissing petitioner John J. Pudelski's petition for habeas corpus is AFFIRMED.

ENTERED BY ORDER OF THE COURT
/s/
Leonard Green
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1: 02 CV 1441
JUDGE DONALD C. NUGENT

[Filed May 30, 2007]

JOHN J. PUDELSKI,	)
	)
Petitioner,	)
	)
v.	)
	)
JULIUS WILSON, Warden,	)
	)
Respondent.	)
	)

JUDGMENT

Pursuant to a Memorandum Opinion and Order of this Court, the Report and Recommendation of Magistrate Judge Patricia A. Hemann, filed on April 24, 2007, is ADOPTED in its entirety (ECF # 38), the Petition for Writ of Habeas Corpus is DENIED (ECF # 1), and Petitioner's objections (ECF # 42) are DENIED.

Furthermore, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); FED. R. APP. P. 22(b).

IT IS SO ORDERED.

/s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: May 30, 2007

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1: 02 CV 1441
JUDGE DONALD C. NUGENT

[Filed May 30, 2007]

JOHN J. PUDELSKI,)
)
Petitioner,)
)
v.)
)
JULIUS WILSON, Warden,)
)
Respondent.)

MEMORANDUM OPINION AND ORDER

This matter comes before the Court upon the Report and Recommendation of Magistrate Judge Patricia A. Hemann. The Report and Recommendation (ECF # 38), filed on April 24, 2007, is ADOPTED by this Court, and Petitioner's Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, on July 25, 2002 (ECF # 1), is denied.

In his Petition, Petitioner raises the following grounds for relief:

Ground one:	The Trial Court Erred in Denying Petitioner's Motions for New Trial Based on Newly Discovered Evidence
Ground two:	The Trial Court Erred in Prohibiting Petitioner and His Trial Counsel from Having Access to the Files and Records upon Which the State's Expert Witness Relied in Her Expert Testimony
Ground three:	The Trial Court Erred in Allowing the Prosecution's Expert Witness, Assistant County Coroner, Dr. Joseph Felo to Testify Relative to His Unscientific and Personal Research in a Manner So as to Present Such Research as Scientific Evidence
Ground four:	The Trial Court Erred in Denying Petitioner's Motion to Dismiss Count 2 of the Indictment – as Death Resulting from Felonious Assault Constitutes Involuntary Manslaughter in Violation of R.C. 2903.04(a), Which Precludes an Indictment for Murder under R.C. 2903.02(b) under Ohio Law
Ground five:	The Trial Court Erred in Refusing the Jury's Request – Based upon

Inconvenience to the Court - to View Microscope Slides Which Had Been Admitted into Evidence and Had Been Delivered to the Jury for Use During its Deliberations

Id. In addition, Petitioner asserts actual innocence as a ground for relief.

Pursuant to Local Rule 72.2, this matter was referred to Magistrate Judge Hemann for the preparation of a report and recommendation. On April 24, 2007, Magistrate Judge Hemann recommended that this Court dismiss Petitioner's Petition.

As to the first ground for relief, the Magistrate Judge found that the Court cannot award habeas relief on this basis. Hence, the Magistrate Judge recommended that the Court dismiss Petitioner's claim that he was denied due process and fundamental fairness when the trial court failed to gant his motions for a new trial.

As to the remaining grounds for relief, the Magistrate Judge recommended that the Court excuse any procedural defaults and examine the merits of each claim. In addressing the second ground for relief, the Magistrate Judge stated that, "[n]o reasonable person can conclude that the failure to give [Petitioner] access to the police report had a substantial and injurious effect on the jury's verdict, and *Brady* did not require the court to give [him] access to the police report in question." (ECF # 38 at 21.) On this basis, the Magistrate Judge recommended that the Court overrule Petitioner's second ground for relief.

Turning to Petitioner's third ground for relief, the Magistrate Judge concluded that there was no error. The Magistrate Judge further stated that, even if there were error, Petitioner was not substantially prejudiced by it. As such, the Magistrate Judge recommended that the Court overrule Petitioner's third ground for relief.

In addressing Petitioner's fourth ground for relief, the Magistrate Judge stated that Petitioner fails to demonstrate, by clear and convincing evidence, that the state appellate court's findings were erroneous. The Magistrate Judge likewise observed that Petitioner "cites no Supreme Court holding on materially indistinguishable facts that the structure of the charges against him violated his right to due process." *(Id.* at 23.) Therefore, the Magistrate Judge recommended that the Court overrule Petitioner's fourth ground for relief.

As to ground five, the final ground for relief, the Magistrate Judge found that Petitioner fails to demonstrate that the state appellate court erred in making its findings of fact and conclusions of law. Further, the Magistrate Judge again observed that Petitioner fails to cite a Supreme Court holding on materially indistinguishable facts that would require a conclusion that the refusal to provide he jury with a microscope deprived him of a fundamentally fair trial. Finally, the Magistrate Judge stated that, even if the trial court erred in this regard, Petitioner fails to demonstrate that he was substantially prejudiced by the alleged error. Accordingly, the Magistrate Judge recommended that the Court overrule Petitioner's fifth ground for relief.

On May 8, 2007, Petitioner filed objections to the Report and Recommendation. (ECF # 42.) In responding to the Report and Recommendation, Petitioner objects to every finding and recommendation made by the Magistrate Judge with respect to all five of the grounds for relief. Respondent has not filed a Response to Petitioner's Objections.

The Court has reviewed the Report and Recommendation *de novo. See Thomas v. Arn,* 474 U.S. 140 (1985). Moreover, it has considered all of the pleadings, motions, and filings of the parties. Despite Petitioner's assertions to the contrary, the Court finds Magistrate Judge Hemann's Report and Recommendation to be well-written, well-supported, and correct. In addition, the Court finds Petitioner's objections to the same to be entirely lacking in merit. Therefore, the Report and Recommendation (ECF # 38) is ADOPTED in its entirety, the Petition for Writ of Habeas Corpus is DENIED (ECF # 1), and Petitioner's objections (ECF # 42) are thereby DENIED.

Furthermore. the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); FED. R. APP. P. 22(b).

IT IS SO ORDERED.

/s/ Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: May 30, 2007

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

CASE NO. 1:02CV1441
JUDGE NUGENT
MAGISTRATE JUDGE HEMANN

[Filed April 24, 2007]

JOHN PUDELSKI,	)
	)
Petitioner,	)
	)
v.	)
	)
JULIUS WILSON, Warden	)
	)
Respondent.	)
	)

REPORT AND RECOMMENDATION
DOCKET #25

This matter is before the magistrate judge pursuant to Local Rule 72.2(b)(2). Before the court is John Pudelski's ("Pudelski") petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Pudelski is in the custody of the Ohio Department of Rehabilitation and Correction pursuant to a journal entry of sentence in the case of *State of Ohio vs. John*

J. Pudelski, Case No. CR 375060 (Cuyahoga County 1999). For the reasons given below the magistrate judge recommends that the court dismiss Pudelski's petition.

I

Pudelski's infant daughter was found dead on March 29, 1999. The cause of death was found to be a recently-inflicted skull fracture. The January 1999 term of the Cuyahoga County grand jury indicted Pudelski on one count of aggravated murder with a death specification because the victim was under 13 years old and, in the alternative, on one count of murder.

Pudelski moved before trial to dismiss the death specification and to dismiss the second count of the indictment. The court denied both motions. Pudelski also moved *in limine* to suppress certain evidence at trial. After a hearing the court granted Pudelski's motion as to most of the evidence but allowed the admission of medical evidence as to the cause of death and allowed the admission of a tape of Pudelski's telephone call to 911. Upon motion of the prosecution, the court dismissed the death specification. The court also dismissed Pudelski's motion to prevent the prosecution from referring to Pudelski's daughter as "the victim" and granted his motion to consider the second count as a lesser-included offense of aggravated murder.

Pudelski's trial began on August 23, 1999:

> In the state's case at trial, the jury heard testimony from appellant's wife (who was also the mother of

the infant victim), medical personnel involved in the delivery and postnatal care of the infant, paramedic and emergency room personnel who responded to the 9-1-1 call regarding the child's death, the county coroner and assistant coroner, and a police officer who investigated the matter.

The mother testified that the infant girl was delivered by Caesarian section on March 17, 1999, and she took her home four days later. The infant fed every four hours, approximately two and one-half to three ounces of formula or breast milk at each feeding, and behaved normally. The mother never noticed any injury to the infant's head.

The neonatologist who was present at the infant's birth had noted a caput or bruise under the scalp but above the skull bone on the back of her head. This is a common injury in newborns and does not have any serious effects on the infant's health. A pediatrician who saw the infant on March 18 and 20 reported that he saw no abnormalities. He would not necessarily have noted a caput in his records unless it was an unusual one. He did not note one here. Neither physician noted any cephalohematoma, or swelling and bleeding of the tissue under the bone, which would have been a more serious injury. A home nurse reported that the baby appeared normal and had no bumps or bruises on her head when the nurse saw her on March 23.

The mother testified that the baby behaved normally throughout the day of Sunday, March 28, 1999. The mother fed her at 8:00 or 9:00 p.m.; the baby consumed almost three and one-half ounces at

that time. The mother put the baby to bed at approximately 9:30 p.m., then took a cough medication, Nyquil, and went to bed herself. The baby's crib was located in the mother's bedroom.

The mother awakened around 12:00 midnight when the baby cried and got up to feed the child. Appellant, her husband, was not in the room when the mother awakened but came in and offered to feed the baby, although he normally went to bed at that time. This was the first time he had fed the baby; he normally paid no attention to her. The mother then went back to sleep.

The mother awakened at 7:00 a.m. and was immediately concerned because the child had not awakened for her normal feeding at 4:00 a.m. She went to the crib and found the baby in a corner with her head against the bumper pad. Her forehead was cold. The mother picked the baby up and felt for a heart beat but felt none. She observed a lump on the side of the baby's head.

The mother began to yell for appellant to wake up. It was unusual for appellant to be sleeping at this time; he was usually up at 6:30 a.m. Appellant jumped up and took the baby from the mother and left the room, returning with the telephone. He ordered the mother to leave the bedroom and wait in the living room for paramedics to arrive.

Paramedics came and took the baby to Euclid Hospital. Appellant and his wife delayed going to the hospital while appellant woke his two daughters from a prior marriage and readied them for school, then took them to his mother's house.

Appellant and his wife proceeded from there to the hospital.

At the hospital, they learned that the baby was dead. They went into a room to see the body, but appellant would not look at her. As they waited in the grieving room for the mother's mother to arrive, appellant said to his wife, Please don't leave me.

The coroner and assistant coroner testified that the baby died as a result of a cerebral edema, or swelling of the brain, which was caused by a blunt impact that also caused a fracture of the skull. They estimated the time of death at approximately 3:00 a.m., and approximately two to three hours after the injury was inflicted. They opined that she was injured after her midnight feeding. The assistant coroner testified that the child would have survived if medical attention had been sought immediately after the injury occurred.

The coroner and assistant coroner both opined that the fracture occurred very recently, certainly less than twenty-four hours before the baby's death. There were no signs of healing around it; the edges of the break were sharp and uncalloused and there was fresh blood at the site. There were no macrophages (clean-up cells) at the site of the fracture, though there were some in the adjacent scalp. They opined that these macrophages were present because of the caput that occurred at birth. There was no evidence the fracture was a new break at the same site as a fracture that had occurred earlier. Macrophages would have been present at the fracture site if the fracture were not new. The fracture could not have occurred after

death because the body had to have been alive to pump the fresh blood that had oozed around the area.

The coroner opined that the death was a homicide. She reached this conclusion because the child had a fracture that was not a birth injury, she could not have caused the fracture herself, and nothing accidental had happened, so the injury had to have been inflicted.

Detective Raymond Jorz testified that appellant and his wife came in to the police station together voluntarily on March 31, 1999, and were interviewed separately. Appellant was interviewed by Detective Jorz and Lieutenant Brooks. They asked appellant whether the baby had suffered any accidental injuries, and appellant said she had not. Appellant related that he had fed the baby around midnight and stayed up with her until approximately 1:30 a.m., then put her in her crib after she went to sleep. He went to bed himself and awakened at approximately 3:30 a.m., used the bathroom, then returned to bed. He did not check on the baby at that time. His wife woke him the following morning after she found the baby cold and unresponsive.

When police informed appellant that the baby had a skull fracture, appellant suggested that the fracture was caused by the emergency medical technicians or that the coroner was examining the wrong child. He denied knowledge of any injury.

State v. Pudelski, 2001 WL 259215, at *1-*3 (Ohio App. March 15, 2001). The prosecution challenged Pudelski

to present evidence tending to support the existence of an earlier injury. Pudelski failed to do so, and the prosecution emphasized this point in its closing arguments.

A jury found Pudelski not guilty of aggravated murder but guilty of murder. The court denied Pudelski's motion for a post-judgment verdict of acquittal or, in the alternative, for a new trial. On September 29, 1999 the court sentenced Pudelski to 15 years to life imprisonment.

Pudelski filed a timely motion for a new trial on October 1, 1999. He claimed that newly-discovered photographic evidence showed that a bruise resulting from the injury which killed his daughter was present ten days before the child's death, contrary to testimony at trial. The court denied the motion on December 17, 1999.

Pudelski filed a notice of appeal on October 28, 1999. He was represented on appeal by the same attorneys who had represented him at trial. The appellate court granted Pudelski delays to supplement his brief to appeal rulings on his post-conviction motion, but it struck a brief which exceeded page limitations. Pudelski asserted eight assignments of error in his appeal:

1. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN OVERRULING THE DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT OF ACQUITTAL.

2. THE DEFENDANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

3. THE DEFENDANT'S CONVICTION IS BASED UPON THE IMPERMISSIBLE STACKING OF INFERENCES.

4. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTIONS FOR A NEW TRIAL.

5. THE TRIAL COURT COMMITTED PREJUDICIAL ERRORS IN ITS EVIDENTIARY RULINGS.

6. PROSECUTORIAL MISCONDUCT DURING THE COURSE OF THE TRIAL DEPRIVED THE DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL.

7. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS.

8. DEATH RESULTING FROM FELONIOUS ASSAULT CONSTITUTES INVOLUNTARY MANSLAUGHTER WHICH PRECLUDES AN INDICTMENT FOR MURDER.

The appellate court announced an opinion affirming the judgment of the trial court on March 15, 2001 and filed the opinion on April 3, 2001. Pudelski filed a timely motion for reconsideration pursuant to Ohio App. R. 26(A), contending that the appellate court had denied assignments of error 4 and 6 without sufficient

explanation. The appellate court denied the motion for reconsideration on October 10, 2001.

Pudelski, again represented by his trial attorneys, filed a timely notice of appeal in the Ohio Supreme Court. Pudelski's memorandum in support of jurisdiction asserted four propositions of law:

Proposition of Law No. 1:

A Finding of Prosecutorial Misconduct Will Result in the Reversal of a Conviction Unless the State Proves, By a Preponderance of Evidence, that Such Misconduct Had No Effect Upon the Jury's Deliberations.

Proposition of Law No. 2:

A New Trial Based upon Newly Discovered Evidence Requires Proof of New Evidence, Material to the Defense, Which the Defendant Could Not, with Reasonable Diligence, Have Been Discovered [sic] and Produced at Trial.

Proposition of Law No. 3:

An Appellate Court Shall Determine and Give Meaningful Reasons in Writing Upon All Assignments of Error Raised on Appeal.

Proposition of Law No. 4:

Opinion Testimony is Admissible When the Witness Has Been Presented With Facts or Data Within the Personal Knowledge of the Witness or the Facts or Data Have Been Admitted in Evidence.

The Ohio Supreme Court denied leave to appeal and dismissed the appeal as not involving any substantial constitutional question on July 25, 2001.

On November 8, 2001 Pudelski filed *pro se* an application to reopen his appeal pursuant to Ohio App. R. 26(B). Pudelski failed to include in his application, as required by the rule, arguments or assignments of error not considered by the appellate court or assignments of error considered on an incomplete record due to appellate counsel's deficient performance. The court denied his application on November 9, 2001.

On February 3, 2002 Pudelski moved to exceed the 10-page limit for an application, and the court denied the motion as moot on February 15, 2002.

On February 21, 2002 Pudelski moved *pro se* in the trial court for an order requiring the Department of Children and Family Services to release to him all records related to his former wife and surviving daughters. He also requested an order requiring that he be provided with a copy of his ex-wife's statement to the Euclid Police Department. Pudelski stated that he intended to use these materials in writing a petition for post-conviction relief. The court denied Pudelski's motion on March 21, 2002.

Pudelski filed a petition for a federal writ of habeas corpus in this court on July 26, 2002. Pudelski claims five grounds for relief:

A. Ground one: The Trial Court Erred in Denying Petitioner's Motions for New Trial Based on Newly Discovered Evidence.

B. Ground two: The Trial Court Erred in Prohibiting Petitioner and His Trial Counsel from Having Access to the Files and Records upon Which the State's Expert Witness Relied in Her Expert Testimony.

C. Ground three: The Trial Court Erred in Allowing the Prosecution's Witness, Assistant County Coroner, Dr. Joseph Felo to Testify Relative to His Unscientific and Personal Research in a Manner So as to Present Such Research as Scientific Evidence.

D. Ground four: The Trial Court Erred in Denying Petitioner's Motion to Dismiss Count 2 of the Indictment -- as Death Resulting from Felonious Assault Constitutes Involuntary Manslaughter in Violation of R.C. 2903.04(a), Which Precludes an Indictment for Murder under R.C. 2903.02(b) under Ohio Law.

E. Ground five: The Trial Court Erred in Refusing the Jury's Request - Based upon Inconvenience to the Court - to View Microscope Slides Which Had Been Admitted into Evidence and Had Been Delivered to the Jury for Use During its Deliberations.

Pudelski also claims actual innocence as a ground for relief. Respondent filed an Answer on October 18, 2002 (Docket #13).

On November 12, 2002 Pudelski moved for a stay of the proceedings to allow him to reopen the appeal of his criminal conviction and exhaust all issues relevant to his habeas petition. The court granted Pudelski's

motion on March 20, 2003, staying consideration of Pudelski's first four grounds for relief and dismissing the fifth ground to allow Pudelski to exhaust state remedies.

On April 21, 2003 Pudelski filed a motion for postconviction relief in the trial court. Pudelski contended that he was denied due process of law when the trial court refused to provide the jury a microscope to view slides admitted as evidence at trial and was denied effective assistance of counsel when counsel did not object to the court's refusal to provide a microscope and did not raise the issue on appeal. On September 15, 2003 the trial court dismissed Pudelski's petition as untimely and found that the issues he raised were barred by *res judicata*. The trial court failed to issue findings of fact and conclusions of law with its decision.

Pudelski timely appealed the decision of the trial court to the state court of appeals. The state appellate court dismissed Pudelski's appeal for failure to include the trial court's findings of fact and conclusions of law with his appeal. Pudelski refiled his motion for postconviction relief in the trial court. On February 26, 2005 the trial court again dismissed his appeal, this time adopting by reference findings of fact and conclusions of law.

Pudelski timely appealed the trial court's decision. He raised four assignments of error on appeal:

> Court below erred in dismissing Appellant's post conviction petition where appellant was denied due process of law when trial court refused to provide

jury a microscope to view demonstrative slide evidence admitted at trial.

Court below erred in dismissing appellant's post conviction petition where appellant was denied effective assistance counsel [sic] when his counsel failed to object to the court's refusal to provide the jury a microscope to view demonstrative slide evidence admitted at trial and failed to properly appeal the issue.

The trial court erred in dismissing Appellant's post conviction petition on grounds of res judicata where appellant was represented by the same trial counsel and Appellant's motion to re-open was denied.

The trial court violated the Appellant's Fifth, Sixth and Fourteenth Amendment rights in dismissing Appellant's post conviction petition.

On February 23, 2005 the state appellate court upheld the trial court's determination that Pudelski's petition had been untimely and found that the trial court's refusal to provide the jury a microscope was not reversible error.

Pudelski timely appealed the state appellate court's decision to the Ohio Supreme Court. On August 2, 2006 the Ohio Supreme Court dismissed Pudelski's appeal.

Pudelski filed a Traverse on August 28, 2006 (Docket #34) and moved on December 12, 2006 to lift the stay of proceedings. On February 20, 2007 the

court granted Pudelski's motion to lift its stay. Thus, the petition is ready for decision.

II

A. *Jurisdiction*

Writs of habeas corpus may be granted by a district court within its respective jurisdiction:

> Where an application for a writ of habeas corpus is made by person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application.

28 U.S.C. § 2241(a) and (d).

Title 28 U.S.C. § 2254(a) provides in relevant part, "[A] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Federal jurisdiction attaches on a petition for a writ of habeas corpus when an petitioner in custody files for the writ.

Pudelski was sentenced within the geographic jurisdiction of the court. This court has jurisdiction over Pudelski's petition.

Respondent argues that the court does not have jurisdiction over Pudelski's first ground for relief because it presents a question of state law and does not claim that Pudelski is in custody in violation of the Constitution or laws or treaties of the United States. For this reason, respondent argues, the court does not have jurisdiction over Pudelski's first ground for relief.

Respondent errs. In his brief in support of his petition, Pudelski states his first ground for relief as follows:

> PETITIONER WAS DENIED DUE PROCESS OF LAW AND HIS CONVICTION VIOLATES FUNDAMENTAL FAIRNESS BECAUSE THE TRIAL COURT IMPROPERLY DEEMED NEW, DIRECT PHOTOGRAPHIC EVIDENCE SUPPORTING THE THEORY OF THE DEFENSE AS CUMULATIVE TO EXPERT TESTIMONY EVEN THOUGH THERE WAS NO SUCH PRIOR DIRECT EVIDENCE THAT THE DECEASED INFANT HAD SUFFERED A SEVERE HEAD INJURY AT BIRTH IN THE EXACT SAME LOCATION AS THE HEAD INJURY WHICH WAS THE CAUSE OF HER DEATH.

Brief in Support of Petition for Habeas Corpus ("Brief"; Docket #3), p. 2. Pudelski clearly frames his first ground for relief as a federal claim.

Respondent is correct, however, in arguing that Pudelski cannot be granted relief upon this ground. Pudelski's first ground for relief alleges a federal violation in the trial court's adjudication of his motion for a new trial pursuant to Ohio R. Crim. P. 33(A)(6). Such a motion initiates a post-conviction proceeding.

The Sixth Circuit has held that other than certain alleged errors in a first appeal of right, the writ is not available for alleged errors in state post-conviction proceedings:

> The writ, traditionally, has been available when the petitioner is in custody or threatened with custody and the detention is related to a claimed constitutional violation. In *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), the Supreme Court analyzed the scope of the applicability of the writ of habeas corpus, stating:
>
> > It is clear, not only from the language of ... § 2254(a), but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody. 411 U.S. at 484, 93 S.Ct. at 1833.
>
> * * * * *
>
> [T]he writ is not the proper means by which prisoners should challenge errors or deficiencies in state post-conviction proceedings . . . because the claims address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration. . ."[E]ven where there may be some error in state post-conviction proceedings, this would not entitle appellant to federal habeas corpus relief since appellant's claim here represents an attack on a proceeding collateral to detention of appellant and not on the detention itself." [*Williams v. Missouri*, 640 F.2d 140, 144 (8th Cir.)]

> . . . [T]he petition must directly dispute the fact or duration of the confinement. Though the *ultimate* goal in this case . . . is release from confinement, the result of habeas review of the specific issues before us is not in any way related to the confinement. We decline to allow the scope of the writ to reach this second tier of complaints about deficiencies in state post-conviction proceedings.

Kirby v. Dutton, 794 F.2d 245, 246-47 (6th Cir. 1986).

Because the court can not award habeas relief based on Pudelski's first ground for relief, the magistrate judge recommends that the court dismiss Pudelski's claim that he was denied due process and fundamental fairness when the trial court failed to grant his motion for a new trial.

B. Evidentiary hearing

The habeas corpus statute authorizes an evidentiary hearing in limited circumstances when the factual basis of a claim has not been adequately developed in state court proceedings. 28 U.S.C. § 2254(e)(2). There is no need for an evidentiary hearing in the instant case. All Pudelski's claims involve legal issues which can be independently resolved without additional factual inquiry.

C. Exhaustion of state remedies

A state prisoner must exhaust all available state remedies or have no remaining state remedies available prior to seeking review of a conviction via federal habeas corpus. 28 U.S.C. § 2254(b) and (c); *Castillo v. Peoples*, 489 U.S. 346, 349 (1989); *Riggins v.*

Macklin, 936 F.2d 790, 793 (6th Cir. 1991). If any state procedures for relief remain available, the petitioner has not exhausted state remedies. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

A petitioner must fairly present any claims to the state courts in a constitutional context properly to exhaust state remedies. *Anderson v. Harless*, 489 U.S. 4 (1982); *Picard v. Connor*, 404 U.S. 270 (1971); *Shoultes v. Laidlaw*, 886 F.2d 114, 117 (6th Cir. 1989). Federal courts lack jurisdiction to consider any claim that was not fairly presented to the state courts. *Newton v. Million*, 349 F.3d 873, 877 (6th Cir. 2003). "[O]nce the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." *Picard*, 404 U.S. at 275; *see also Harris v. Reeves*, 794 F.2d 1168, 1174 (6th Cir. 1986). The exhaustion requirement is properly satisfied when the highest court in the state in which petitioner was convicted has been given a full and fair opportunity to rule on all of the petitioner's claims. *Manning v. Alexander*, 912 F.2d 878, 881-83 (6th Cir. 1990).

Pudelski has no remaining state remedies. For this reason, his claims have been exhausted.

D. Procedural default

Respondent argues that Pudelski has procedurally defaulted his second, third, fourth, and fifth grounds for relief. Reasons of federalism and comity generally bar federal habeas corpus review of "contentions of federal law . . . not resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure." *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). When a petitioner

> has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991).

If the state argues that a petitioner has procedurally defaulted, the court must conduct a four-step analysis to determine whether the petitioner has indeed defaulted and, if so, whether the procedural default may be excused:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule. . . . Second, the court must decide whether the state courts actually enforced the state procedural sanction. . . . Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim. . . . This question generally will involve an examination of the legitimate state interests behind the procedural rule in light of the federal interest in considering federal claims. . . . [Fourth, if] the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate . . . that there was "cause" for him to not follow the

> procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986).

A federal court has a duty to consider the merits of procedurally defaulted claims, however, when failure to do so would result in a "fundamental miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 320-21 (1995); *see also Sawyer v. Whitley*, 505 U.S. 333, 339-340 (1992); *McCleskey v. Zant*, 499 U.S. 467, 495 (1991); *Smith v. Murray*, 477 U.S. 527, 537 (1986); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986); *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986); *Engle v. Isaac*, 456 U.S. 107, 135 (1982). The exception for a fundamental miscarriage of justice is explicitly tied to the petitioner's innocence to ensure that the exception is applied only to extraordinary cases while ensuring that it is available to those who are truly deserving. *Schlup*, 513 U.S. at 321; *Carrier*, 477 U.S. at 496. A colorable claim of actual innocence "requires petitioner to support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." *Schlup*, 513 U.S. at 324. The petitioner must show that in light of the new evidence and presuming a conscientious jury, "it is more likely than not that no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt." *Id.* at 327. A colorable claim of actual innocence requires a habeas court to consider the merits of procedurally defaulted claims.

In the instant case, Pudelski argues that he is actually innocent of the crime of which he was

convicted. Pudelski adduces in support of his claim of actual innocence a photograph of the fatally injured child taken before Pudelski was alleged to have struck the child and showing a visible injury at the site of the infant's fatal skull fracture. He also presents affidavits of three medical experts who testified for the defense at Pudelski's trial, asserting that had the photograph been available to them at trial it would have provided certain proof of the existence of a birth trauma at the site of the fatal fracture. Given the centrality of such evidence to the theory of the defense at trial and to the prosecution's challenge in closing arguments to produce evidence of an injury earlier than the evening of the child's death, such a photograph must be said to make Pudelski's claims of innocence at least colorable. For this reason the magistrate judge recommends that the court excuse any procedural defaults and examine the merits of Pudelski's five grounds for relief.

III

The Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") altered the standard of review that a federal court must apply when deciding whether to grant a writ of habeas corpus. As amended, 28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under the current deferential standard of review, a writ of habeas corpus may issue only if the state court's decision is contrary to clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence. *Williams v. Taylor*, 529 U.S. 362, 379-90 (2000); *Miller v. Francis*, 269 F.3d 609, 613-14 (6th Cir. 2001). Law is "clearly established" only by holdings of the Supreme Court, not its dicta, and the law must be clearly established at the time of the petitioner's conviction. *Harris v. Stovall*, 212 F.3d 940, 943-44 (6th Cir. 2000).

Courts must give independent meaning to the phrases "contrary to" and "unreasonable application of" in § 2254(d)(1):

> Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "*contrary to* ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "*involved an unreasonable application of* ... clearly established Federal law, as determined by the Supreme Court of the United States."

Williams, 529 U.S. at 405 (emphasis added by the quoting court). A decision is "contrary to" clearly established federal law if it reaches a conclusion opposite to that reached by Supreme Court holdings on a question of law or if it faces a set of facts materially indistinguishable from relevant Supreme Court precedent and still arrives at an opposite result. *Id.* "A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Id.* A decision involves an unreasonable application of federal law only if the deciding court correctly identifies the legal principle at issue and unreasonably applies it to the facts of the case at hand. *Doan v. Brigano*, 237 F.3d 722, 729-31 (2001). If a court fails to identify the correct legal principal at issue, the "unreasonable application of" clause does not apply. *Id.* at 730.

"[A] determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). The petitioner, however, may rebut "the presumption of correctness by clear and convincing evidence." *Id.* The magistrate judge will consider Pudelski's remaining claims under the deferential standard of review accorded the state court's determination of a prisoner's constitutional claims.

A. Ground two: The trial court denied Pudelski due process and fundamental fairness in denying him access to files and records on which the state's expert witness relied in her testimony

Pudelski argues in his second ground for relief that he was denied due process and fundamental fairness when the court refused to require the state of Ohio to

turn over to Pudelski police reports relied on by its expert witness, Chief County Coroner Elizabeth Balraj ("Balraj"), in giving expert testimony at trial. According to Pudelski, the failure to give him access to the reports violated Ohio Evid. R. 704 and deprived him of exculpatory information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

The right to a fair trial is a right implicit in the due process clauses of the Fifth and Fourteenth Amendments. *See United States v. Agurs*, 427 U.S. 97, 107 (1976). The analysis of alleged violations of the right is identical under either amendment. *Id.* "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 684 (1984). "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Murchison*, 349 U.S. at 136 (quoting *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927)).

Not all violations of the right to a fair trial, however, entitle a petitioner to habeas relief. In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Supreme Court held that a court considering a collateral review of a conviction should weigh constitutional "trial

error"[1] by (1) evaluating the error in the context of the entire record; (2) asking whether the trial error had a substantial and injurious effect on the jury's verdict, and (3) granting relief only if there is grave doubt about whether the error was harmless. *id.* at 638. A court may not grant habeas relief unless it believes that the error had a substantial and injurious effect on the jury's verdict. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995).

In the instant case Balraj testified that she concluded that the infant's death was a homicide, rather than an accident, in part as a result of information in a police report that the infant had not suffered any accident prior to her death. Transcript of proceedings ("Tr."), Answer, Exh. 54, pp. 929, 980-86. Pudelski's counsel requested a copy of the police report

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[1] According to the Supreme Court,

> [t]rial error "occur[s] during the presentation of the case to the jury," and is amenable to harmless-error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." *Id.*, at 307-308 [citing *Arizona v. Fulminante*, 499 U.S. 279, 307 (1991)]. At the other end of the spectrum of constitutional errors lie "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Id.*, at 309. The existence of such defects--deprivation of the right to counsel, for example--requires automatic reversal of the conviction because they infect the entire trial process. See *id.*, at 309-310. Since our landmark decision in *Chapman v. California*, 386 U.S. 18 (1967), we have applied the harmless-beyond-a-reasonable-doubt standard in reviewing claims of constitutional error of the trial type.

Brecht, 507 U.S. at 629-30.

upon which Balraj relied in coming to her expert opinion that the death was a homicide. After a *voir dire* of Balraj, the trial court ruled that Pudelski was not entitled to a copy of the police report.

Even if it is assumed that the failure to give Pudelski access to the police report violated Ohio Evid. R. 704, it cannot be concluded that denying Pudelski access to the report also denied him due process and a fair trial. As Balraj testified, she concluded that the death was a homicide in part because the police found no accident which could have resulted in the infant's fatal fracture. One of the witnesses for the state at Pudelski's trial was Detective Raymond Jorz ("Jorz"), who investigated the victim's death. Jorz's testimony on direct and cross examination included a description of the investigation, the results obtained by the investigation, and the conclusions reached by the police from those results. Tr. at 791-860. Jorz's testimony on re-cross examination also included a reading of the affidavit he submitted to obtain a warrant to search Pudelski's home for evidence related to the homicide of Pudelski's daughter. Tr. at 900-05. In performing the investigation and making the affidavit, Jorz primarily relied on information from Pudelski and Pudelski's wife, Sarah Pudelski ("S. Pudelski"), and possibly upon information from Dr. Joseph Felo ("Felo"), a deputy coroner for Cuyahoga County, Ohio, and from paramedics responding to Pudelski's emergency call following his wife's discovery of his daughter's body. S. Pudelski, Felo, and one of the paramedics responding to the emergency call testified at the trial. The testimony of Jorz regarding the investigation indicated that the investigation found no reason to believe the victim had suffered an accident prior to her death. Pudelski's own statements to Jorz

during the investigation confirmed this conclusion. Given that Balraj's expert opinion relied on the report only to eliminate accident as a cause of death, that the detective investigating the infant's death testified regarding the nature and conclusions of the report, that all sources of information used in the investigation were available for examination at trial, and that the defendant's own statements confirmed the key point on which Balraj relied in concluding that the infant's death was a homicide, no reasonable person can conclude that the failure to give Pudelski access to the report had a substantial and injurious effect on the jury's verdict.

Pudelski's contention that failure to grant him access to the police report violated the holding in *Brady* is similarly without merit. *Brady* and its progeny stand for the proposition that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. There is, however, no indication that the police report contained any information favorable to Pudelski. Rather, the report incriminated Pudelski by eliminating accident as a possible cause of the infant's injury. *Brady* did not require, therefore, that the police report be given to Pudelski.

Pudelski reasons in the following fashion that the report must have contained some information favorable to him:

> Upon receiving the case file and performing the autopsy, Assistant County Coroner Dr. Joseph Felo

> testified that he had no information from which he could conclude the blunt force trauma was intentional, accidental, or other. Similarly, the police, after having concluded their investigation and arresting Petitioner for murder, had no information from which to conclude the infant's death resulted from criminal activity.
>
> Chief County Coroner Dr. Balraj testified, contrarily, however, that she reviewed and relied upon the police information in arriving at her opinions relative to the death of Petitioner's infant daughter.
>
> In light of these instances of disparate testimony, the trial court committed prejudicial, reversible error by refusing to permit defense counsel access to the underlying police reports. It goes without saying that when 1) the police say that they had no evidence of criminal activity until the Coroner said the death was a homicide, and 2) the Coroner says she had no evidence of criminal activity until reviewing the police reports, that those police reports will diminish the credibility of at least one of the State's witnesses. Both stories can't be true. Therefore, the police reports are exculpatory, and crucial to Petitioner's defense case.

Brief at 12. Of course, Pudelski ignores the third alternative: that even though neither the information gathered by the coroner nor the information gathered by the police *independently* was sufficient to conclude that a crime occurred, both sets of information *together* were sufficient to conclude that a crime had been committed and that Pudelski was its author. Pudelski's conclusion that the police report must contain exculpatory information is erroneous.

No reasonable person can conclude that the failure to give Pudelski access to the police report had a substantial and injurious effect on the jury's verdict, and *Brady* did not require the court to give Pudelski access to the police report in question. For these reasons, the magistrate judge recommends that the court overrule Pudelski's second ground for relief.

B. Ground three: The trial court erred in allowing the prosecution's witness, Assistant County Coroner, Dr. Joseph Felo, to testify about his unscientific research as though it were scientific evidence

Pudelski argues in his third ground for relief that the trial court erred in allowing Felo to testify about his unscientific research as though it were scientific evidence. Presumably, Pudelski is asserting that this violated his right to due process by denying him a fair trial.

The state appellate court reviewing this assignment of error on direct appeal made the following relevant findings of fact and conclusions of law:

> [A]ppellant claims the court erred by allowing the assistant coroner, Dr. Felo, to testify about a research project he performed. At trial, the assistant coroner used demonstrative exhibits from other files in the coroner's office to show the healing processes that take place to injuries as they get older, for purposes of comparison to the recent injury that had been inflicted on this infant. Appellant contends that the assistant coroner did not conduct the research project that led to this evidence in a manner calculated to yield accurate

> results and, therefore, the court should have excluded the resulting exhibits.
>
> Appellant would have this court treat these exhibits as a kind of scientific test result that forms the basis of an expert opinion; however, Dr. Felo clearly did not rely on these exhibits as a basis for his opinion, so the manner in which he found them is irrelevant. Their purpose was to show the healing processes that would be evident in injuries of the type the infant suffered if the injuries had occurred earlier. As such, they were proper demonstrative exhibits.

Pudelski, 2001 WL 259215 at *6.

Pudelski does not address the state appellate court's findings of fact and conclusions of law and does not show by clear and convincing evidence that they were erroneous. Pudelski also makes no effort to show that the alleged trial error had a substantial and injurious effect on the jury's verdict. The court must conclude, therefore, that there was no error and that even if there had been error, Pudelski was not substantially prejudiced by it. Thus, the trial court did not violate Pudelski's right to due process. For these reasons the magistrate judge recommends that the court overrule Pudelski's third ground for relief.

C. Ground four: The trial court erred in denying Pudelski's motion to dismiss the count of Death Resulting from Felonious Assault in violation of Ohio Rev. Code § 2903.04(a)

Pudelski contends that he was denied due process when the trial court denied his motion to dismiss the

count of Death Resulting from Felonious Assault. In addressing this assignment of error during Pudelski's direct appeal, the state appellate court made the following relevant findings of fact and conclusions of law:

> Appellant was charged with having caused the death of another as a proximate result of committing felonious assault, in violation of R.C. 2903.02(B). R.C. 2903.02(B) provides:
>
> No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.
>
> Appellant claims that causing the death of another by means of felonious assault is involuntary manslaughter and that the state is prohibited by the plain language of R.C. 2903.02(B) and R.C. 2901.04(A) from bootstrapping involuntary manslaughter into a charge of murder. Involuntary manslaughter is defined as causing the death of another * * * as a proximate result of the offender's committing or attempting to commit a felony. R.C. 2903.04(A).
>
> While we agree that the offense with which appellant was charged could also constitute involuntary manslaughter, this fact alone did not preclude the state from charging appellant with the higher offense of murder. The elements of a murder charge include more specific requirements as to the degree and nature of the underlying felony than

> does the offense of involuntary manslaughter. Rather than bootstrapping an involuntary manslaughter charge into murder, the involuntary manslaughter charge may be considered a lesser-included offense of murder. *State v. Kidder* (1987), 32 Ohio St.3d 279, 282, 513 N.E.2d 311. Therefore, the eighth assignment of error is overruled.

Pudelski, 2001 WL 259215 at *8.

Pudelski does not demonstrate by clear and convincing evidence that the state appellate court's findings were erroneous. Moreover, Pudelski cites no Supreme Court holding on materially indistinguishable facts that the structure of the charges against him violated his right to due process. Indeed, Pudelski cites only state law in his argument and does nothing to demonstrate a federal constitutional violation. For these reasons the magistrate judge recommends that the court overrule Pudelski's fourth ground for relief.

D. Ground five: The trial court erred in refusing the jury's request for a microscope to view slides which had been admitted into evidence

Pudelski argues that he was denied a fair trial in violation of his right to due process when the trial court refused the jury's request during its deliberations for a microscope to view slides containing samples of human tissue. The state appellate court addressed this assignment of error on appeal of the trial court's denial of Pudelski's motion for postconviction relief. At that time the state appellate

court made the following relevant findings of fact and conclusions of law:

> {¶ 33} At trial, during jury deliberations, the jury sought use of a microscope to view tissue sample slides of the victim that had been marked and admitted into evidence. To be viewed, the slides required the use of a large, unique microscope that was not readily available.
>
> {¶ 34} The jurors, through the foreperson, submitted two written requests on the issue to the trial court. The questions, as quoted in the appellant's brief from the transcript, are as follows:
>
> {¶ 35} "I received the following message from the jury, and I quote, we are requesting, with your permission, a microscope to view the slide evidence period. Thanking you in advance for your time and cooperation."
>
> {¶ 36} "The court has another message, which I will read, that the slides were admitted into evidence, and the questions that the foreman asks, and it's a valid question, is how are we to view these, and he adds we have a trained and certified microbiologist among us."
>
> {¶ 37} At trial, in an effort to avoid the appearance of prejudice to either side, both the prosecutor and counsel for the defendant agreed to allow the court to address this issue. Thus responsibility for denying the jury the use of the microscope was focused on the trial court rather than on the parties.

{¶ 38} The trial court informed the jury on the record that it denied the jury a microscope in part because the jury indicated in the second note that the jury had a "trained and certified microbiologist among us." The court, in part, told the jury: "Now, frankly, that's one of the reasons that I'm declining to produce this microscope. Because the jury is the jury. And the jury is not an expert, per se."

{¶ 39} The court added: "So what does the jury have in this case? It has the expert testimony of, I believe, six experts on various points. The jury has its collective recollection, and although the notes are not evidence, the notes have a value to assist the jury in recalling its recollection of the evidence." These facts demonstrate the court was legitimately concerned about the jury taking on an investigatory role. Ohio law precludes independent investigations by jurors. R.C. 2945.79(A) and (B) expressly outline juror misconduct as a reason for a new trial:

{¶ 40} "(A) Irregularity in the proceedings of the court, *jury,* prosecuting attorney, or the witnesses for the state, or for any order of the court, or abuse of discretion by which the defendant was prevented from having a fair trial;

{¶ 41} "(B) Misconduct of the *jury,* prosecuting attorney, or the witnesses for the state[.]" (Emphasis added.)

{¶ 42} In analyzing a case of alleged juror misconduct, a trial court would have to engage in a two-tier inquiry. First, it would have to determine whether juror misconduct occurred. If so, it would

then have to determine if the misconduct materially affected the defendant's substantial rights. *State v. Jerido,* (Feb. 26, 1998), Cuyahoga App. No. 72327. Further, OJI Section 402.21 recommends the following instruction involving investigation by the jurors to avoid the risk of misconduct:

{¶ 43} "WARNING. You may not investigate or attempt to obtain additional information on this case outside the courtroom. It is highly improper for anyone of you to attempt to do so."

{¶ 44} Here, the trial court was properly precluding the jury from conducting an improper investigation. The record reveals that there were other grounds stated for the court's concern. On the record, the prosecutor noted that the slides in question did not have identifiable marks that would orient a viewer as to what was being observed. The prosecutor outlined this problem:

{¶ 45} "Judge, it's the understanding of the state that nowhere on any of the slides is the orientation reflected so that even a physician would have trouble recognizing what portion of the body you are looking at."

{¶ 46} In light of the fact that the slides were presented and testified to by an expert, the jury had the evidence before them to consider. Allowing the jurors to conduct an independent investigation in the jury room with a "trained and certified microbiologist" could have so tainted the expert's testimony and prejudiced the role of the jury that

> the trial court's decision to preclude the use of a microscope was not error.

State v. Pudelski, 2006 WL 440271, at *5-*6 (Ohio App. Feb. 23, 2006).

Pudelski does not address the particular concerns of the trial court and the state appellate court in ensuring that the jury was not tainted by an independent investigation resting on the supposed expertise of one of its members. Because he does not address this issue, Pudelski fails to demonstrate that the state appellate court erred in making its findings of fact and conclusions of law. Pudelski also cites no Supreme Court holding on materially indistinguishable facts that would require the conclusion that the refusal to provide the jury a microscope deprived Pudelski of a fundamentally fair trial.[2] Finally, even if the court did err in not giving

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[2] Pudelski cites Fed. Evid. R. 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), for the proposition that when an expert witness testifies that a particular slide supports a fact, it is necessary that a jury be able to examine that slide with a microscope to confirm that the testimony of the expert is based upon sufficient data. First, Fed. Evid. R. 702 has no relevance to this case. The federal evidentiary rules apply only to federal cases. Pudelski's case was a state case, conducted pursuant to *Ohio's* evidentiary rules. Second, *Daubert* does not stand for the proposition that a jury must be allowed to examine the data on which the expert's opinion rested to determine whether the opinion was adequately warranted by the evidence. *Daubert* simply requires that under certain circumstances the trier of fact should be allowed to hear scientific opinion. Third, even if *Daubert* did stand for the proposition claimed by Pudelski, *Daubert* did not

the jury access to a microscope, Pudelski does nothing to demonstrate that he was substantially prejudiced by this alleged trial error. For these reasons the magistrate judge recommends that the court overrule Pudelski's fifth ground for relief.

IV

For the reasons given above the magistrate judge recommends that the court deny Pudelski's petition for a writ of habeas corpus.

Date: April 24, 2007

/s/Patricia A. Hemann
Patricia A. Hemann
United States Magistrate Judge

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).

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involve the problem of potential jury contamination, which distinguishes it from Pudelski's case. In short, Pudelski cites no Supreme Court holding applicable to the facts of his case.

APPENDIX E

[Cite as *State v. Pudelski*, 2006-Ohio-811.]

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 85989

DATE OF ANNOUNCEMENT OF DECISION
February 23, 2006

STATE OF OHIO	)
	)
Plaintiff-Appellee	)
	)
vs.	)
	)
JOHN J. PUDELSKI	)
	)
Defendant-Appellant	)
	)

CHARACTER OF PROCEEDINGS

Civil appeal from Common Pleas Court
Case No. CR-375060

JUDGMENT AFFIRMED.

DATE OF JOURNALIZATION

JOURNAL ENTRY AND OPINION

APPEARANCES:

For plaintiff-appellee	WILLIAM D. MASON, ESQ. Cuyahoga County Prosecutor By: JON W. OEBKER, ESQ. Assistant County Prosecutor Justice Center - 9th Floor 1200 Ontario Street Cleveland, Ohio 44113
For defendant-appellant	EDWIN J. VARGAS, ESQ. Summers & Vargas Co. LPA 2000 Illuminating Building 55 Public Square Cleveland, Ohio 44113

SEAN C. GALLAGHER, J.:

{¶ 1} Appellant John Pudelski appeals the decision of the trial court dismissing his petition to vacate or set aside judgment and/or sentence pursuant to R.C. 2953.21 and 2953.23.

{¶ 2} Pudelski was convicted of the murder of his infant daughter, Ellie Marie Pudelski, and sentenced to a term of fifteen years to life on September 19, 1999. This court affirmed his conviction and sentence in *State v. Pudelski* (March 15, 2001), Cuyahoga App. No. 77172. Pudelski filed an initial motion for postconviction relief on April 23, 2003, which was denied on September 15, 2003 by the trial court; however, because the trial court failed to issue findings of fact and conclusions of law, Pudelski's initial

postconviction appeal was dismissed. Subsequently, the matters were refiled in the trial court, and the trial court again dismissed the postconviction petition, this time adopting the state's findings of fact and conclusions of law on February 26, 2005, resulting in the current appeal.

{¶ 3} Pudelski also filed a writ of habeas corpus pursuant to Section 28 U.S.C.A. 2254 in United States District Court for the Northern District of Ohio. This writ was dismissed on March 18, 2003 to allow Pudelski to exhaust available state remedies.

{¶ 4} The facts of Pudelski's underlying conviction were outlined by this court in the direct appeal in *State v. Pudelski* (March 15, 2001), Cuyahoga App. No. 77172, and are restated here for clarity.

{¶ 5} "Appellant John J. Pudelski was charged in a two-count indictment filed April 14, 1999. Count one charged him with aggravated murder in violation of R.C. 2903.01 specifically, purposely causing the death of his infant daughter, Ellie Marie Pudelski. Count two charged him with murder; that is, causing the infant's death as a proximate result of committing or attempting to commit felonious assault, a first or second degree felony that is an offense of violence.

{¶ 6} "Appellant moved the court to suppress oral statements he made to the police, to dismiss the death penalty specification on count one, and to dismiss the murder charge contained in count two of the indictment. After a hearing on the motion to suppress, the court denied all three motions. However, the state was given leave to remove the death penalty specification from the indictment on July 23, 1999.

{¶ 7} "The case proceeded to trial on August 23, 1999. In addition to the charges of murder and aggravated murder, the jury was also instructed on the lesser included offense of involuntary manslaughter as a proximate result of child endangering. The jury returned a verdict finding appellant not guilty of aggravated murder but guilty of murder. The court sentenced him to fifteen years' to life imprisonment and overruled his motions for acquittal and for a new trial. Appellant timely appealed his conviction and the denial of his post-verdict motions.

{¶ 8} "In the state's case at trial, the jury heard testimony from appellant's wife (who was also the mother of the infant victim), medical personnel involved in the delivery and postnatal care of the infant, paramedic and emergency room personnel who responded to the 9-1-1 call regarding the child's death, the county coroner and assistant coroner, and a police officer who investigated the matter.

{¶ 9} "The mother testified that the infant girl was delivered by Caesarian section on March 17, 1999, and she took her home four days later. The infant fed every four hours, approximately two and one-half to three ounces of formula or breast milk at each feeding, and behaved normally. The mother never noticed any injury to the infant's head.

{¶ 10} "The neonatologist who was present at the infant's birth had noted a caput or bruise under the scalp but above the skull bone on the back of her head. This is a common injury in newborns and does not have any serious effects on the infant's health. A pediatrician who saw the infant on March 18 and 20 reported that he saw no abnormalities. He would not

necessarily have noted a caput in his records unless it was an unusual one. He did not note one here. Neither physician noted any cephalohematoma, or swelling and bleeding of the tissue under the bone, which would have been a more serious injury. A home nurse reported that the baby appeared normal and had no bumps or bruises on her head when the nurse saw her on March 23.

{¶ 11} "The mother testified that the baby behaved normally throughout the day of Sunday, March 28, 1999. The mother fed her at 8:00 or 9:00 p.m.; the baby consumed almost three and one-half ounces at that time. The mother put the baby to bed at approximately 9:30 p.m., then took a cough medication, Nyquil, and went to bed herself. The baby's crib was located in the mother's bedroom.

{¶ 12} "The mother awakened around 12:00 midnight when the baby cried and got up to feed the child. Appellant, her husband, was not in the room when the mother awakened but came in and offered to feed the baby, although he normally went to bed at that time. This was the first time he had fed the baby; he normally paid no attention to her. The mother then went back to sleep.

{¶ 13} "The mother awakened at 7:00 a.m. and was immediately concerned because the child had not awakened for her normal feeding at 4:00 a.m. She went to the crib and found the baby in a corner with her head against the bumper pad. Her forehead was cold. The mother picked the baby up and felt for a heart beat but felt none. She observed a lump on the side of the baby's head.

{¶ 14} "The mother began to yell for appellant to wake up. It was unusual for appellant to be sleeping at this time; he was usually up at 6:30 a.m. Appellant jumped up and took the baby from the mother and left the room, returning with the telephone. He ordered the mother to leave the bedroom and wait in the living room for paramedics to arrive.

{¶ 15} "Paramedics came and took the baby to Euclid Hospital. Appellant and his wife delayed going to the hospital while appellant woke his two daughters from a prior marriage and readied them for school, then took them to his mother's house. Appellant and his wife proceeded from there to the hospital.

{¶ 16} "At the hospital, they learned that the baby was dead. They went into a room to see the body, but appellant would not look at her. As they waited in the grieving room for the mother's mother to arrive, appellant said to his wife, Please don't leave me.

{¶ 17} "The coroner and assistant coroner testified that the baby died as a result of a cerebral edema, or swelling of the brain, which was caused by a blunt impact that also caused a fracture of the skull. They estimated the time of death at approximately 3:00 a.m., and approximately two to three hours after the injury was inflicted. They opined that she was injured after her midnight feeding. The assistant coroner testified that the child would have survived if medical attention had been sought immediately after the injury occurred.

{¶ 18} "The coroner and assistant coroner both opined that the fracture occurred very recently, certainly less than twenty-four hours before the baby's

death. There were no signs of healing around it; the edges of the break were sharp and uncalloused and there was fresh blood at the site. There were no macrophages (clean-up cells) at the site of the fracture, though there were some in the adjacent scalp. They opined that these macrophages were present because of the caput that occurred at birth. There was no evidence the fracture was a new break at the same site as a fracture that had occurred earlier. Macrophages would have been present at the fracture site if the fracture were not new. The fracture could not have occurred after death because the body had to have been alive to pump the fresh blood that had oozed around the area.

{¶ 19} "The coroner opined that the death was a homicide. She reached this conclusion because the child had a fracture that was not a birth injury, she could not have caused the fracture herself, and nothing accidental had happened, so the injury had to have been inflicted.

{¶ 20} "Detective Raymond Jorz testified that appellant and his wife came in to the police station together voluntarily on March 31, 1999, and were interviewed separately. Appellant was interviewed by Detective Jorz and Lieutenant Brooks. They asked appellant whether the baby had suffered any accidental injuries, and appellant said she had not. Appellant related that he had fed the baby around midnight and stayed up with her until approximately 1:30 a.m., then put her in her crib after she went to sleep. He went to bed himself and awakened at approximately 3:30 a.m., used the bathroom, then returned to bed. He did not check on the baby at that

time. His wife woke him the following morning after she found the baby cold and unresponsive.

{¶ 21} "When police informed appellant that the baby had a skull fracture, appellant suggested that the fracture was caused by the emergency medical technicians or that the coroner was examining the wrong child. He denied knowledge of any injury." *State v. Pudelski* (March 15, 2001), Cuyahoga App. No. 77172.

{¶ 22} Pudelski raises four assignments of error. For the reasons outlined below, we reject Pudelski's claims and affirm the decision of the trial court dismissing Pudelski's postconviction motion.

{¶ 23} Pudelski's assignments of error are listed as follows:

{¶ 24} ". "Court below erred in dismissing Appellant's post conviction petition where appellant was denied due process of law when trial court refused to provide jury a microscope to view demonstrative slide evidence admitted at trial."

{¶ 25} "I. "Court below erred in dismissing appellant's post conviction petition where appellant was denied effective assistance counsel [sic] when his counsel failed to object to the court's refusal to provide the jury a microscope to view demonstrative slide evidence admitted at trial and failed to properly appeal the issue."

{¶ 26} "II. "The trial court erred in dismissing Appellant's post conviction petition on grounds of res judicata where appellant was represented by the same

trial counsel and Appellant's motion to re-open was denied."

{¶ 27} "V. "The trial court violated the Appellant's Fifth, Sixth and Fourteenth Amendment rights in dismissing Appellant's post conviction petition."

{¶ 28} Because all of the assignments of error relate to the trial court's failure to provide the jury with a microscope to view evidentiary slides and defense counsel's failure to object to this fact or raise it on the initial appeal, the assignments of error will be addressed together.

{¶ 29} We first note that the trial court found that Pudelski's petition was not timely filed. Further, we note that the trial court determined that the issues raised here are precluded by res judicata.

{¶ 30} Pudelski filed his petition to vacate or set aside the judgment or sentence on April 21, 2003, more than two years after his conviction and long after the one hundred and eighty days mandated by R.C. 2953.23(A)(1) and (2). In addition, while Pudelski claims he was unfairly prejudiced by having the same counsel at trial and on appeal, the fact remains that he filed a pro se application to reopen his appeal on November 6, 2001, in which he failed to raise the issue involving the trial court's decision to preclude the jury's use of a microscope.

{¶ 31} It is well settled that the doctrine of res judicata applies in postconviction relief proceedings. "Under the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in

any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial, which resulted in that judgment or conviction, or on an appeal from that judgment." *State v. Cole* (1982), 2 Ohio St.3d 112, 113, citing *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus. (Emphasis omitted.)

{¶ 32} Pudelski correctly points out that because he was represented by the same counsel at trial and on direct appeal, res judicata would not act as a bar to raising a claim of ineffective assistance of counsel in a subsequent postconviction proceeding. See *State v. Lentz* (1994), 70 Ohio St.3d 527, 529. However, "[o]nce ineffective assistance of counsel has been raised and adjudicated, res judicata bars its relitigation." *State v. Cheren*, 73 Ohio St.3d 137, 138, 1995-Ohio-28. Although Pudelski failed to raise the issue of ineffective assistance of counsel in his pro se application to reopen his appeal, he argues that his application was dismissed and the issue was never adjudicated. Even if we were to accept Pudelski's argument about res judicata, we can find no error in the trial court's determination of Pudelski's claims. Not only was the petition untimely, but, also, the claims fail on the merits. In the interests of justice, we will address the core of Pudelski's claim that his counsel was ineffective and the trial court committed error in not providing the jury with a microscope during deliberations. The facts shaping the trial court's determination are outlined as follows:

{¶ 33} At trial, during jury deliberations, the jury sought use of a microscope to view tissue sample slides of the victim that had been marked and admitted into

evidence. To be viewed, the slides required the use of a large, unique microscope that was not readily available.

{¶ 34} The jurors, through the foreperson, submitted two written requests on the issue to the trial court. The questions, as quoted in the appellant's brief from the transcript, are as follows:

{¶ 35} "I received the following message from the jury, and I quote, we are requesting, with your permission, a microscope to view the slide evidence period. Thanking you in advance for your time and cooperation."

{¶ 36} "The court has another message, which I will read, that the slides were admitted into evidence, and the questions that the foreman asks, and it's a valid question, is how are we to view these, and he adds we have a trained and certified microbiologist among us."

{¶ 37} At trial, in an effort to avoid the appearance of prejudice to either side, both the prosecutor and counsel for the defendant agreed to allow the court to address this issue. Thus responsibility for denying the jury the use of the microscope was focused on the trial court rather than on the parties.

{¶ 38} The trial court informed the jury on the record that it denied the jury a microscope in part because the jury indicated in the second note that the jury had a "trained and certified microbiologist among us." The court, in part, told the jury: "Now, frankly, that's one of the reasons that I'm declining to produce

this microscope. Because the jury is the jury. And the jury is not an expert, per se."

{¶ 39} The court added: "So what does the jury have in this case? It has the expert testimony of, I believe, six experts on various points. The jury has its collective recollection, and although the notes are not evidence, the notes have a value to assist the jury in recalling its recollection of the evidence." These facts demonstrate the court was legitimately concerned about the jury taking on an investigatory role. Ohio law precludes independent investigations by jurors. R.C. 2945.79 (A) and (B) expressly outline juror misconduct as a reason for a new trial:

{¶ 40} "(A) Irregularity in the proceedings of the court, *jury*, prosecuting attorney, or the witnesses for the state, or for any order of the court, or abuse of discretion by which the defendant was prevented from having a fair trial;

{¶ 41} "(B) Misconduct of the *jury*, prosecuting attorney, or the witnesses for the state[.]" (Emphasis added.)

{¶ 42} In analyzing a case of alleged juror misconduct, a trial court would have to engage in a two-tier inquiry. First, it would have to determine whether juror misconduct occurred. If so, it would then have to determine if the misconduct materially affected the defendant's substantial rights. *State v. Jerido*, (Feb. 26, 1998), Cuyahoga App. No. 72327. Further, OJI Section 402.21 recommends the following instruction involving investigation by the jurors to avoid the risk of misconduct:

{¶ 43} "WARNING. You may not investigate or attempt to obtain additional information on this case outside the courtroom. It is highly improper for anyone of you to attempt to do so."

{¶ 44} Here, the trial court was properly precluding the jury from conducting an improper investigation. The record reveals that there were other grounds stated for the court's concern. On the record, the prosecutor noted that the slides in question did not have identifiable marks that would orient a viewer as to what was being observed. The prosecutor outlined this problem:

{¶ 45} "Judge, it's the understanding of the state that nowhere on any of the slides is the orientation reflected so that even a physician would have trouble recognizing what portion of the body you are looking at."

{¶ 46} In light of the fact that the slides were presented and testified to by an expert, the jury had the evidence before them to consider. Allowing the jurors to conduct an independent investigation in the jury room with a "trained and certified microbiologist" could have so tainted the expert's testimony and prejudiced the role of the jury that the trial court's decision to preclude the use of a microscope was not error.

{¶ 47} Pudelski's reliance on *State v. Crimi* (1995), 106 Ohio App.3d 13, for the proposition that the jury should have been provided a microscope is unpersuasive. *Crimi* involved a jury request to review the videotape of a police chase. Images of a police chase are well within the understanding of a lay

person acting as a juror. Reviewing videotape images is in stark contrast to conducting scientific investigations involving autopsy slides in the jury room.

{¶ 48} Pudelski also asserts counsel was ineffective for failing to object to the trial court's ruling denying use of the microscope. In evaluating whether a defendant has been denied his Sixth Amendment right to effective assistance of counsel, the ultimate query is "whether the accused, under all the circumstances, * * * had a fair trial and substantial justice was done." *State v. Hester* (1976), 45 Ohio St.2d 71, paragraph four of the syllabus. Moreover, in order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel performed deficiently and that he suffered prejudice from the deficiency. *State v. Turner*, 105 Ohio St.3d 331, 338, 2005-Ohio-1938. "Deficient performance consists of falling below an objective standard of reasonable representation; to prove prejudice, a defendant must demonstrate that, but for counsel's errors, the result of the proceeding would have been different." Id., citing *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus.

{¶ 49} Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689. In Ohio, there is a presumption that a properly licensed attorney is competent and the defendant has the burden of proof to establish counsel's performance was deficient. *State v. Calhoun*, 86 Ohio St.3d 279, 1999-Ohio-102. Further, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on

the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland,* 466 U.S. at 690.

{¶ 50} Here, it is clear that defense counsel understood the jury could not conduct an independent investigation. It was not error for defense counsel to fail to object to something that would be improper. A number of experts testified, and the trial court admitted a set of slides offered by the defense. It is apparent from the limited record before us that any examination of the slides would have to be considered in light of the accompanying expert testimony. For these reasons, we would overrule Pudelski's assignments of error and affirm the decision of the trial court.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., P.J., AND DIANE KARPINSKI, J., CONCUR.

SEAN C. GALLAGHER
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-3856

[Filed October 26, 2009]

JOHN PUDELSKI,	)
	)
Petitioner-Appellant,	)
	)
v.	)
	)
JULIUS WILSON,	)
	)
Respondent-Appellee.	)
	)

BEFORE: CLAY and MCKEAGUE, Circuit Judges; and HOLSCHUH,* District Judge.

ORDER

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the

* Hon. John D. Holschuh, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Clay would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk